

1991

Planning for the Second Century of the Second Circuit Court of Appeals: The Report of the Federal Courts Study Committee

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ST. JOHN'S LAW REVIEW



SYMPOSIUM CELEBRATING THE CENTENNIAL OF THE SECOND CIRCUIT COURT OF APPEALS (1891-1991)

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PLANNING FOR THE SECOND CENTURY OF THE SECOND CIRCUIT COURT OF APPEALS: THE REPORT OF THE FEDERAL COURTS STUDY COMMITTEE

ROGER J. MINER*

I. INTRODUCTION

The celebration of the Centennial of the United States Court of Appeals for the Second Circuit presents an excellent occasion to consider the court's future as well as its past. Any planning for the future must take account of the comprehensive report recently issued by the Federal Courts Study Committee. The report identifies a number of problems presently facing the entire system of United States courts and proposes various long- and short-term solutions to those problems. It recognizes that the structures, practices and traditions of the past are not to be lightly discarded and that change for its own sake is to be avoided. It also recognizes that essential needs for reform cannot be ignored. The purpose of this Article is to review the major findings and recommendations of the Study Committee Report relating to federal courts of appeals and to evaluate them in light of the condition of the Court of Appeals for the Second Circuit at the inception of the court's second one hundred years. Relevant to the evaluation are the special institutional concerns, customs and requirements of the Second Circuit Court of Appeals as it begins the second century of its existence. For this court will prepare for its second century not only on the basis of a study nationally undertaken; it also will turn to the experiences of its own unique and distinguished past as, Janus-like, it looks toward, and plans for, the future.

II. HISTORICAL PERSPECTIVES

The United States Circuit Court of Appeals for the Second

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Circuit, as the court then was known, convened for the first time on June 16, 1891 at the United States Post Office Building and Courthouse, Park Row and Broadway in New York City. Present at that first session were Associate Justice Samuel Blatchford of the Supreme Court, who presided, and Circuit Judges William J. Wallace and E. Henry Lacombe.¹ According to the original Minute Book, the court appointed a Clerk, a Marshal, and a Crier, and then adjourned until October 27, 1891.² The court had been created by the Act of March 3, 1891 ("Evarts Act"),³ popularly known by the name of its principal sponsor, Senator William Evarts of New York. A joint resolution of Congress required that each of the nine circuit courts of appeals created by the Act hold its first meeting on the third Tuesday in June 1891.⁴

The enormous caseloads of the federal courts provided the impetus for court reform in 1891. By that time, there were 42,584 cases pending in the federal courts of the nation, 21,990 of those in the courts within the Second Circuit alone.⁵ Much of the increase in litigation came about as a result of the expansion of commerce and industry that followed the end of the Civil War.⁶ Legislation enacted in 1875 conferring general federal question jurisdiction upon the federal courts and expanding diversity jurisdiction⁷ contributed in large measure to the heavy volume. Most affected were the circuit courts in the Second Circuit. From 1789, the circuit courts had exercised both trial and appellate jurisdiction. As originally constituted in the Judiciary Act of 1789, the circuit courts had no judges of their own and were comprised of a district court judge and two Supreme Court Justices "riding circuit."⁸ The increase in Supreme Court business over the years made it less and less possible for the Justices to attend the sittings of the circuit courts.

Eventually, in 1869, Congress created a circuit judgeship for each of the nine circuits and provided that the circuit court could be held by the circuit Justice, circuit judge, or district judge or by

¹ U.S. CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, MINUTES 1891-1892, at 1 (original court document).

² *Id.* at 41.

³ Ch. 517, 26 Stat. 826 (1891) [hereinafter *Evarts Act*].

⁴ S. Con. Res. 17, 26 Stat. 1115, 1115-16 (1891).

⁵ M. SCHICK, *LEARNED HAND'S COURT* 51 (1970).

⁶ *SECOND CIRCUIT REDBOOK* 1989-1990, at 5 (1989).

⁷ Act of March 3, 1875, ch. 137, 18 Stat. 470.

⁸ Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 74.

one or more of them in combination.⁹ A Justice was required to sit with the circuit court in each district within his circuit only once every two years.¹⁰ The Justices found it difficult to sit even once every two years, and the circuit judges could not keep up with the workload. Thus, by the late 1880's, district court judges sitting alone disposed of eight-ninths of the circuit court litigation.¹¹ The federal courts were unable to cope with the volume of cases with which they were confronted, and the courts of the Second Circuit, despite the addition of another circuit judgeship in 1887,¹² clearly were inundated by the time of the adoption of the Evarts Act.

Although the Evarts Act provided for the appointment of two circuit judges for each of the other eight courts of appeals, it provided for the appointment of three in the Second Circuit.¹³ This action by Congress apparently was informed by the caseload experiences of the past. The Circuit Court of Appeals for the Second Circuit attained full strength with the appointment of Judge Nathaniel Shipman, who joined Judges Wallace and Lacombe on the court in March 1892.¹⁴ Approximately 196 cases were docketed that year,¹⁵ and it appears that admiralty cases predominated.¹⁶ The judges continued to sit as trial judges on the old circuit court until 1911, when the old circuit court was abolished and the trial jurisdiction of circuit courts was transferred to the district courts throughout the nation.¹⁷ As the caseloads in all federal courts increased over the years owing to the expansion of the population and federal court jurisdiction, the United States Courts of Appeals, as they became known in 1948,¹⁸ expanded as well. Today, there are thirteen courts of appeals, including a court for the District of Columbia Circuit, a court for each of eleven numbered circuits (each covering three to ten states), and the specialized Court of

⁹ Act of April 10, 1869, ch. 22, 16 Stat. 44, 44-45.

¹⁰ *Id.* at 45.

¹¹ J.B. MORRIS, *FEDERAL JUSTICE IN THE SECOND CIRCUIT* 70 (1987) (Second Circuit Historical Comm.).

¹² Act of March 3, 1887, ch. 347, 24 Stat. 492.

¹³ Evarts Act, *supra* note 3, § 1; M. SCHICK, *supra* note 5, at 52.

¹⁴ See BICENTENNIAL COMMITTEE OF THE JUDICIAL CONFERENCE OF THE U.S., *JUDGES OF THE UNITED STATES* 261, 449, 513 (2d ed. 1983) (biographies of Judges Lacombe, Shipman and Wallace).

¹⁵ M. SCHICK, *supra* note 5, at 58.

¹⁶ See J.B. MORRIS, *supra* note 11, at 94.

¹⁷ Act of March 3, 1911, ch. 231, 36 Stat. 1087, 1167.

¹⁸ Act of June 25, 1948, ch. 646, § 43(a), 62 Stat. 869, 870.

Appeals for the Federal Circuit.¹⁹ Prior to the Judicial Improvements Act of 1990,²⁰ a total of 168 active judges were authorized to sit in these courts.²¹ The 1990 Act added eleven judgeships, for a total of 179, and the number in each court now ranges between six in the First Circuit and twenty-eight in the Ninth Circuit.²² No judgeships were added to the thirteen presently authorized in the Second Circuit.

III. CURRENT CONDITIONS

The population of the United States tripled between 1900 and 1990, but appeals filed in the courts of appeals during the same period rose from 1,093 to 40,898, a thirty-seven fold increase.²³ In 1945, there were fifty-nine judgeships and 2,730 filings (forty-six filings per authorized judgeship) in all the courts of appeals in the nation.²⁴ Forty-five years later, in 1990, there were 156 judgeships and 40,898 filings (262 per authorized judgeship),²⁵ which represents an increase in appeals filed of 1,498% and an increase in filings per judgeship of 570%.²⁶

On June 30, 1989, 30,006 unresolved cases were pending in the courts of appeals of the nation,²⁷ and the median time interval between filing a notice of appeal and final disposition was 10.3 months.²⁸ As of December 31, 1990, 32,736 cases were pending.²⁹

¹⁹ C. WRIGHT, *LAW OF THE FEDERAL COURTS* §§ 3, 10 (4th ed. 1983).

²⁰ Pub. L. No. 101-650, tit. II, § 202, 104 Stat. 5089 [hereinafter *Judicial Improvements Act*].

²¹ 28 U.S.C. § 44(a) (1988) (amended 1990).

²² *Judicial Improvements Act*, *supra* note 20, tit. II, § 202, at 5098-5100.

²³ 1 *FEDERAL COURTS STUDY COMMITTEE, WORKING PAPERS & SUBCOMMITTEE REPORTS* 32, figure 1 (July 1, 1990) [hereinafter 1 *WORKING PAPERS*]; *ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS* 136 (1989) [hereinafter 1989 *ADMINISTRATIVE OFFICE REPORT*].

²⁴ Flanagan, *Appellate Court Caseloads: A Statistical Overview* (Sept. 14, 1989), in 2 *FEDERAL COURTS STUDY COMMITTEE, WORKING PAPERS & SUBCOMMITTEE REPORTS*, at table 1 (following p. 13) (July 1, 1990) [hereinafter 2 *WORKING PAPERS*].

²⁵ *REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES* 52 (Sept. 12, 1990) [hereinafter *PRELIMINARY JUDICIAL CONFERENCE REPORT*].

²⁶ See Flanagan, *supra* note 24. Statistics for the Court of Appeals for the Federal Circuit are excluded. The United States Court of Appeals for the Federal Circuit was created by Congress in 1982, see Pub. L. No. 97-164, tit. I, 96 Stat. 37 (1982), as a national appellate court, and was given exclusive appellate jurisdiction in certain specialized matters, including patents and Tariff Act disputes. See 28 U.S.C. § 1295(a) (1988).

²⁷ 1989 *ADMINISTRATIVE OFFICE REPORT*, *supra* note 23.

²⁸ *Id.* at 151.

²⁹ *ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS* 19 (Dec. 31, 1990) [hereinafter *WORKLOAD STATISTICS*].

The upward trend continued from 1988, when there were 37,524 filings (240 per authorized judgeship),³⁰ 27,644 cases pending at the end of the 1988 statistical year,³¹ and a median time interval between filing and disposition of 10.1 months.³² According to the 1990 preliminary report of the Director of the Administrative Office of the United States Courts, the number of cases appealed to the regional courts of appeals reached 40,898 for the statistical year ending June 30, 1990 "due to a significant increase of almost 1,500 appeals of criminal cases."³³ The Director reported that "[d]ispositions increased three percent this year to 38,520, but remained below the level of filings, resulting in an eight percent increase in the pending caseload by year's end."³⁴

In the Second Circuit, the number of judgeships in the Court of Appeals has increased from three in 1891 to thirteen in 1991, or 433%. Filings, however, have increased from 196 in 1892 (the first full year of the court's operation)³⁵ to 3,424 in 1990,³⁶ a gain of 1,747%. There have been substantial increases just in the last two years. From 1988 to 1989, filings increased 7.8%, from 2,942 to 3,172.³⁷ In 1990, there were 252 more filings than in 1989, an increase of 7.9%.³⁸ The upward trend has begun to produce problems for a court long known for the expeditious handling of its caseload. In 1989, for the first time in many years, the Court of Appeals for the Second Circuit was unable to dispose of as many appeals as were filed during the year. The shortfall for 1989 was 184 cases, although some 2,988 cases were terminated—forty-six more than were terminated in 1988.³⁹ The shortfall for 1990 was held to 150, with 3,274 cases terminated—286 more than were terminated in 1989.⁴⁰ Even with greater effort in the disposition of cases, it has

³⁰ 1989 ADMINISTRATIVE OFFICE REPORT, *supra* note 23.

³¹ *Id.* at 137.

³² *Id.* at 155.

³³ PRELIMINARY JUDICIAL CONFERENCE REPORT, *supra* note 25.

³⁴ *Id.*

³⁵ M. SCHICK, *supra* note 5, at 58.

³⁶ U.S. COURTS FOR THE SECOND CIRCUIT, SECOND CIRCUIT REPORT 1990, at 5 [hereinafter 1990 SECOND CIRCUIT REPORT].

³⁷ U.S. COURTS FOR THE SECOND CIRCUIT, SECOND CIRCUIT REPORT 1989, at 4 [hereinafter 1989 SECOND CIRCUIT REPORT].

³⁸ 1990 SECOND CIRCUIT REPORT, *supra* note 36, at 4.

³⁹ 1989 SECOND CIRCUIT REPORT, *supra* note 37.

⁴⁰ 1990 SECOND CIRCUIT REPORT, *supra* note 36, at 4. It appears that the court in 1990 again succeeded in disposing of more cases than were filed. 3,495 appeals, a record high, were docketed, and 3,614 appeals were disposed of during the statistical year 1990. Wise,

not been possible to keep filings and terminations in balance.

Filings per judgeship in the Second Circuit rose from 226 in 1988 to 244 in 1989 to 263 in 1990. Surprisingly, median disposition times for those years remained fairly constant—6.5 months in 1988,⁴¹ 6.1 months in 1989,⁴² and 6.5 months in 1990.⁴³ For many years the fastest circuit in the nation in terms of appeals, the Second apparently was "outgunned" by the Third in 1990.⁴⁴ The continuing increase in the number of appeals filed, however, points to an inevitable future increase in the time required for the disposition of appeals. It also points to larger inventories of cases remaining at the end of each year. At the end of statistical year 1988, 818 cases were pending;⁴⁵ at the end of 1989, 1,004 cases were unresolved;⁴⁶ and, at the end of 1990, 1,156 cases remained.⁴⁷ Criminal appeals accounted for much of the caseload surge in the Second Circuit in the last two years, increasing to 669 in 1989 from the previous year's 539 and to 795 in 1990.⁴⁸ Much of this increase is attributed to appeals of sentences imposed under the Sentencing Reform Act of 1984⁴⁹ and appeals in cases involving controlled substances.

Comparisons between conditions in 1891 and conditions in 1991 are inevitable. The federal courts of the nation are inundated in 1991, as they were in 1891, with caseloads that have been increasing in geometric proportions. As in 1891, the Second Circuit continues to bear a large share of the burden. Although the causes of today's litigation explosion may be different from those that prevailed one hundred years ago, the issue is very much the same—whether the federal courts are so overburdened as to call into question their ability to provide for "the just, speedy, and in-

Circuit Court's Backlog Cut by 10 percent, N.Y.L.J., July 5, 1991, at 1.

⁴¹ U.S. COURTS FOR THE SECOND CIRCUIT, SECOND CIRCUIT REPORT 1988, at 7 [hereinafter 1988 SECOND CIRCUIT REPORT].

⁴² 1989 SECOND CIRCUIT REPORT, *supra* note 37, at 7.

⁴³ 1990 SECOND CIRCUIT REPORT, *supra* note 36, at 7.

⁴⁴ *Id.*

⁴⁵ 1988 SECOND CIRCUIT REPORT, *supra* note 41, at 4.

⁴⁶ 1989 SECOND CIRCUIT REPORT, *supra* note 37, at 4.

⁴⁷ 1990 SECOND CIRCUIT REPORT, *supra* note 36, at 4.

⁴⁸ *Id.*; 1989 SECOND CIRCUIT REPORT, *supra* note 37, at 4.

⁴⁹ Pub. L. No. 98-473, ch. II, 98 Stat. 1987. The effect of the more liberal provisions for appeal of sentences under the Sentencing Reform Act of 1984 was not felt until challenges to the constitutionality of the Act were rejected by the Supreme Court in *United States v. Mistretta*, 488 U.S. 361 (1989).

expensive determination of every action.”⁵⁰ It seems certain that the courts of appeals of the nation are confronted with two options as they begin their second century of existence.⁵¹ One option is to continue the present course, with the expectation of incremental increases in the appellate caseload and with expansion of the appellate judiciary continually lagging behind need. The other option is a change of course involving some adjustments in the operation of the federal court system. Court structure, procedure, case management methods, decisional process, and subject matter jurisdiction are areas in which appropriate and effective adjustments might be made. Apparent is the need for a detailed study to identify possible alternatives in each of these areas and to point the course for the future. In 1988, Congress directed that such a study be undertaken.

IV. CONGRESSIONAL CONCERNS

Its attention somehow having been drawn to the crisis in the federal courts that it had no small part in creating,⁵² and to its responsibilities under the Constitution of the United States,⁵³ Congress enacted the Federal Courts Study Act (“Act” or “Study Act”) on November 19, 1988, effective January 1, 1989.⁵⁴ The Act established as part of the Judicial Conference of the United States⁵⁵ “a Federal Courts Study Committee on the future of the Federal judiciary.”⁵⁶ According to the Act, the purposes of the Committee were to inquire into issues and problems confronting the federal courts of the nation and to develop a long-range plan

⁵⁰ FED. R. CIV. P. 1.

⁵¹ See Miner, *Federal Courts at the Crossroads*, 4 CONST. COMMENTARY 251 (1987); see also Campbell, *Into the Third Century: Views of the Appellate System from the Federal Courts Study Committee*, 74 MASS. L. REV. 292 (1989).

⁵² See Miner, *supra* note 51, at 252-54.

⁵³ U.S. CONST. art. I, § 8, cl. 9 empowers Congress “[t]o constitute Tribunals inferior to the supreme Court.” U.S. CONST. art. III, § 1, cl. 1 vests judicial power “in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”

⁵⁴ Pub. L. No. 100-702, tit. I, 102 Stat. 4642, 4644 (1988) [hereinafter *Federal Courts Study Act*].

⁵⁵ The Judicial Conference of the United States is composed of the Chief Justice of the United States, the chief judge of each judicial circuit, the chief judge of the Court of International Trade, and a district judge from each judicial circuit. See 28 U.S.C. § 331 (1988). Through its supervision of the Administrative Office of the United States Courts, it exercises general administrative control over the federal court system.

⁵⁶ Federal Courts Study Act, *supra* note 54, § 102(a).

for the federal judiciary's future.⁵⁷ Congress specifically directed the Committee to make "assessments" of alternate dispute resolution methods, federal court system structure and administration, methods of resolving inter- and intra-circuit conflicts in courts of appeals, and "the types of disputes resolved by the Federal Courts."⁵⁸ The Committee was empowered to make a complete study of the courts, with such recommendations and conclusions as it deemed advisable, including recommendations for "revisions to be made to laws of the United States."⁵⁹

Since the Committee was made a part of the Judicial Conference, Congress fittingly designated the Chief Justice of the United States, who presides over the Conference, to appoint the fifteen members of the Committee and to select one of the members as Chairman.⁶⁰ The designation of the Chief Justice also may have served to avoid any separation of powers problems.⁶¹ The Study Act established a time limit of fifteen months from its effective date for the filing of the Committee Report.⁶² To carry out its functions and accomplish its purposes, the Committee was authorized to promulgate rules,⁶³ to conduct hearings,⁶⁴ to request assistance and information from various government departments and agencies,⁶⁵ to establish advisory panels,⁶⁶ and to expend the sum of \$300,000 for each of the fiscal years 1989 and 1990.⁶⁷ Provision was made for the Committee to dissolve sixty days after filing its report.⁶⁸

The Committee members appointed by the Chief Justice were, as required by the Study Act, "representative of the various interests, needs and concerns which may be affected by the jurisdiction of the Federal courts."⁶⁹ The Committee included five federal

⁵⁷ *Id.* § 102(b)(1)-(2).

⁵⁸ *Id.* § 102(b)(2)(A)-(D).

⁵⁹ *Id.* § 105(2).

⁶⁰ *Id.* § 103(a)-(b).

⁶¹ *Cf. United States v. Mistretta*, 488 U.S. 361, 408 (1989) (rejecting argument that establishment of United States Sentencing "Commission violates the Constitution by requiring Article III judges to share judicial power with nonjudges").

⁶² Federal Courts Study Act, *supra* note 54, § 105(1).

⁶³ *Id.* § 103(d).

⁶⁴ *Id.* § 104(a).

⁶⁵ *Id.* § 104(b).

⁶⁶ *Id.* § 104(d).

⁶⁷ *Id.* § 108.

⁶⁸ *Id.* § 107.

⁶⁹ *Id.* § 103(b).

judges, four members of Congress, an assistant attorney general of the United States, a former United States solicitor general, a state judge, the general counsel of a state's Department of Public Advocacy, and two attorneys in private practice.⁷⁰ Three working subcommittees were established by the Committee—one on Administration, Management, and Structure; one on Role and Relationships; and one on Workload.⁷¹ Reporters and associate reporters supported each subcommittee, and various consultants and advisory panels rendered assistance.

Its work coordinated by a small professional staff based at the federal courthouse in Philadelphia, the Committee sought the views of a wide spectrum of individuals and organizations to carry out its mandate. Within three months after it was formed, the Committee held hearings in Atlanta, Boston, Chicago and Pasadena.⁷² On December 22, 1989, the Committee distributed its tentative recommendations and solicited comments. Responses were received at public hearings held during January 1990 in nine cities, including New York and Washington, D.C.⁷³ More than 270 witnesses testified at these hearings regarding the draft recommendations. At the public hearing held in Washington, D.C., "committee member Sen. Charles Grassley (R-Iowa) said the committee's report should highlight the 'very dire need' for more judges and should relegate suggested alternatives to a footnote."⁷⁴ Fortunately, the Committee did not adopt Senator Grassley's proposal.

V. ADJUSTMENTS PROPOSED

The Federal Courts Study Committee rendered its final report on April 2, 1990. The Committee first acknowledged that its fifteen-month study was conducted in response "to mounting public and professional concern with the federal courts' congestion, delay, expense, and expansion."⁷⁵ It then modestly noted that it had "conducted the most comprehensive examination of the federal court system in the last half century—a period of unprecedented

⁷⁰ REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, app. B, at 193 (Apr. 2, 1990) [hereinafter STUDY COMMITTEE REPORT].

⁷¹ *Id.* at 31-32.

⁷² *Id.* at 32.

⁷³ *Id.* at 32-33.

⁷⁴ *Sweeping Changes Recommended by Federal Courts Study Committee*, 58 U.S.L.W. 2442 (1990).

⁷⁵ STUDY COMMITTEE REPORT, *supra* note 70, at 3.

growth and change in federal law and federal courts."⁷⁶ The "incremental, not radical" proposals contained in the report were designed to make a "better federal court system, not a smaller one."⁷⁷ If adopted, the proposals "would merely prevent the system from being overwhelmed by a rapidly growing and already enormous caseload; and in doing so they would preserve access to the system for those who most need it."⁷⁸

Omitted from the Committee's proposals is any further increase in the number of federal judges. The Committee specifically concluded that the problems of the federal courts could *not* be solved by the continuous and indefinite expansion of the federal judiciary. That conclusion was supported by a finding that effective judicial performance can be assured "only if federal judges are carefully selected from a pool of competent and eager applicants and only if they are sufficiently few in number to feel a personal stake in the consequences of their actions. Neither condition can be satisfied if there are thousands of federal judges."⁷⁹ The Committee further found that "[e]ven if a highly competent federal judiciary consisting of thousands of judges could be created and maintained, the coordination of so many judges would be extraordinarily difficult."⁸⁰ Noted in this regard was the fact that an increase in the number of trial judges inevitably leads to an increase in the number of appellate judges, which inevitably leads to an increase in the rate of appeals "because it becomes more difficult to predict the behavior of the appellate court."⁸¹ Since the capacity of the Supreme Court for review is limited, the increased volume brought about by the expansion of the federal judiciary would cause the High Court increasing difficulty in maintaining uniformity in federal law. Even within a circuit, uniformity suffers when there are too many judges on a court of appeals. Increasing the number of courts so as to have fewer judges per court is no solution, since it creates the potential for an increase in intercircuit

⁷⁶ *Id.*

⁷⁷ *Id.* at 3-4. Although the Study Committee characterizes many of the proposals as "not radical," there has been a mixed reaction to the proposals. See Coyle, *Proposals on Courts Debated*, Nat'l L.J., Feb. 12, 1990, at 1, col. 1.

⁷⁸ STUDY COMMITTEE REPORT, *supra* note 70, at 4. For a summary of the Study Committee's proposals, see *Sweeping Changes in Federal Judiciary Urged by Federal Courts Study Committee*, 58 U.S.L.W. 2599 (1990).

⁷⁹ STUDY COMMITTEE REPORT, *supra* note 70, at 7.

⁸⁰ *Id.*

⁸¹ *Id.*

conflicts and the consequent burden on the Supreme Court to resolve the conflicts.

How many federal judges are too many? Before the Judicial Improvements Act of 1990, there were 168 circuit judges and 575 district judges (including those seated in territorial courts), a total of 743. After the Act, there are 179 circuit judges and 636 district judges (including those seated in territorial courts), a total of 815. According to the Study Committee Report, "[i]t has been suggested that 1,000 is the practical ceiling on the number of judges if the Article III judiciary is to remain capable of performing its essential functions without significant degradation of quality."⁸² Although there is no magic in numbers and no formula for determining an appropriate cutoff point, it is apparent that the federal judiciary almost has arrived at the "suggested maximum."

Many circuit judges share the opinion that the seats on their courts fast are approaching or already have exceeded the most desirable number. Of the circuit judges responding to a survey conducted by the Committee, forty-eight percent considered eight to ten judges the ideal size for a federal court of appeals and thirty-one percent considered ten to fifteen the ideal size.⁸³ With the new seats created by the Judicial Improvements Act of 1990, every circuit court in the nation but one now exceeds ten, and three exceed fifteen. The judges of the Second Circuit have shown no great enthusiasm for the expansion of the federal judiciary or for an increase in the number of judges sitting on their court.⁸⁴ In fact, they have not requested the addition of any new judgeships since their number was increased from eleven to thirteen in 1984.⁸⁵

A. Court Structure

The Study Committee reviewed various alternatives for the restructuring of the federal appellate court system. Specifically rejected was the 1975 proposal by the Hruska Commission, formally known as the Commission on Revision of the Federal Court Appellate System,⁸⁶ for the establishment of a National Court of Ap-

⁸² *Id.* at 8.

⁸³ Gallard & Wood, *Survey of the United States Circuit Judges* (Oct. 4, 1989), in 2 WORKING PAPERS, *supra* note 24, at 6.

⁸⁴ *See id.*

⁸⁵ Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, tit. II, § 201(a), 98 Stat. 346.

⁸⁶ The Commission was established by Pub. L. No. 92-489, 86 Stat. 807 (1972), as

peals. The proposal envisioned a court whose decisions would have been "binding upon the district courts, the regional courts of appeals, and the state courts on questions of federal law."⁸⁷ This intermediate court, interposed between the circuit courts and the Supreme Court, would have consisted of seven article III judges. It would have sat only in banc and have had its headquarters in Washington, D.C., where argument of appeals ordinarily would have been heard. The National Court of Appeals would have exercised jurisdiction by reference, "under which the Supreme Court could refer to the National Court any case within its appellate jurisdiction,"⁸⁸ and by transfer, "under which the regional courts of appeals could transfer cases that would otherwise be heard by those courts."⁸⁹ However jurisdiction was acquired, any case decided by the National Court would have been subject to review by the Supreme Court on certiorari.

The Hruska Commission concluded that a National Court of Appeals would have been able to decide 150 cases per year and thus double the national appellate capacity; would not have caused undue prolongation of the appellate process; would have resulted in four tiers of review only in rare instances; would not have been limited to the resolution of intercircuit conflicts and thus would have been able to provide authoritative decisions before conflicts even arose; would have reduced the cost of litigation and brought "greater clarity and stability to the national law, with less delay than is often possible today."⁹⁰ Despite the validity of some of these conclusions, the Federal Courts Study Committee gave the notion of a national intermediate appellate court short shrift: "[s]uch a tribunal would enlarge the system's capacity to resolve intercircuit conflicts, but would not solve the problem of growth within the courts of appeals. Hence, by itself, it could resolve only a piece of the problem."⁹¹ The Committee did present five structural alternatives for further inquiry and discussion, without en-

amended by Pub. L. No. 93-420, 88 Stat. 1153 (1974). It was chaired by Senator Roman L. Hruska.

⁸⁷ COMM'N ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATION FOR CHANGE 30 (June 1975).

⁸⁸ *Id.* at 32.

⁸⁹ *Id.*

⁹⁰ *Id.* at 39. For further arguments in favor of an intermediate court of appeals, see Safranek, *Time for an Intermediate Court of Appeals: The Evidence Says "Yes"*, 23 IND. L. REV. 863 (1990).

⁹¹ STUDY COMMITTEE REPORT, *supra* note 70, at 117.

dorsing any one of them.

1. Multiple Circuit Appellate Courts Functioning as a Unified Court⁹²

This structure contemplates a single, unified, national appellate court operating through regional divisions and a federal circuit division. Appeals would come to the regional divisions from the district courts in each region and to the federal circuit division from the United States Claims Court and the United States Court of International Trade. Present circuit boundaries would be replaced by regional boundaries, with the nation evenly divided into regions. Nine judges would serve in each of the regional divisions. The increased number of intercircuit-type conflicts generated by the proliferation of panels would be handled in one of two ways: a rule could be adopted requiring adherence to precedents established by prior panel decisions in other divisions; or a central division of the unified court could be established to hear and decide conflicts among regional divisions.

2. Four-Tiered System⁹³

In this structure, two appellate courts are interposed between the district courts and the Supreme Court. The first appellate tier would consist of twenty to thirty regional appellate divisions, with nine or ten judges per division. Appeals of right from the district courts within a designated geographical area would come to the first-tier appellate division covering that region. The second appellate tier would consist of four or five tribunals located in various areas of the nation. Each second-tier court would have seven judges, and each would take cases on a discretionary basis from a specified grouping of the first-tier courts. The advantage of this structure is said to lie in the ability of the higher tribunal to establish a more coherent body of law within a system that allows all the courts at both levels to remain small in size. The Supreme Court would take cases only from the upper-level courts, allowing the latter to see to the development of uniformity in the decisions of the lower-tier courts. The Court of Appeals for the Federal Circuit is designated as a second-tier court, with appeals taken di-

⁹² *Id.* at 118.

⁹³ *Id.* at 119.

rectly to it from the United States Claims Court and the United States Court of International Trade.

3. National Subject-Matter Courts⁹⁴

Structuring appellate courts by subject matter is not a new concept. One such court already exists in the federal system—the Court of Appeals for the Federal Circuit. An expansion of this concept would leave in place the present regional courts of appeals but would establish a number of subject-matter appellate courts. The latter courts would take appeals from the district courts according to the subject of the case on appeal. Specialized courts might be established to hear appeals in cases involving tax, admiralty, labor, civil rights, administrative, and criminal issues. The regional courts would be relieved of a substantial part of their caseload, and many areas of intercircuit conflict would be eliminated in this scenario. In addition, specialized panels could be created within the regional circuit courts.

4. Single, Centrally Organized Court of Appeals⁹⁵

The structure contemplated by this alternative would have all appeals court judges as members of a single court, assigned to sit where needed but primarily at locations near their homes. Under this setup, all present courts of appeals would be merged into one centrally organized tribunal. Such a court would have the flexibility to allocate judges and resources according to need. It could establish its own precedents for the resolution of conflicts between panels and could experiment with subject-matter courts and internal tiers.

5. Consolidation into Jumbo Circuits⁹⁶

This structure calls for the consolidation of the existing courts into five large circuits. Judges could be assigned to sit in divisions. The large units would allow for the shifting of resources within each jumbo circuit. Each circuit would be free to adopt its own system for the resolution of intracircuit conflicts. Regular in banc

⁹⁴ *Id.* at 120; see also Plager, *The United States Courts of Appeals, the Federal Circuit, and the Non-Regional Subject Matter Concept: Reflections on the Search for a Model*, 39 AM. U.L. REV. 853 (1990).

⁹⁵ STUDY COMMITTEE REPORT, *supra* note 70, at 121.

⁹⁶ *Id.* at 122.

sittings, with rotating memberships, have been suggested as a means of maintaining uniformity in jumbo circuits. The in banc courts would be small and might act as supervisory courts in this structure.

Various criticisms have been leveled at each one of the restructuring proposals. Some of this criticism arises from a simple reluctance to change a system that has worked so well for so long. Judge John Godbold has observed that "[t]he circuits, although artificial creations of Congress, have taken on in the . . . 100 years since 1891 rich and unique identities."⁹⁷ Support for the preservation of those identities and the traditions they represent is very strong. Accordingly, it seems inevitable for the foreseeable future "that changes in the number and contour of circuits on a circuit-by-circuit basis will be few and far between."⁹⁸ The Study Committee itself found some deficiencies in each of the restructuring proposals recommended for further study. The proposal for multiple appellate courts functioning as a unified court was criticized as introducing "additional delay into the litigation process."⁹⁹ In a four-tiered system, "it could be harder to attract able jurists to the lower-tier courts."¹⁰⁰ A single, centrally organized court of appeals "could have all the earmarks of a large bureaucracy, and it would counter the salutary trend . . . toward decentralized administration."¹⁰¹ Jumbo circuits are the subject of "current debate between the Ninth Circuit and the other circuits revolv[ing] around two very different conceptions of an appellate court."¹⁰²

The Ninth Circuit is, of course, the very model of a modern jumbo circuit. It is far and away the largest regional circuit in all respects. Its sprawling geographical area includes the states of Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon,

⁹⁷ Godbold, *Governance of the Courts and Structure of the Circuits*, in *FEDERAL JUDICIAL CENTER, THE FEDERAL APPELLATE JUDICIARY IN THE 21ST CENTURY* 36 (C. Harrison & R. Wheeler ed. 1989).

⁹⁸ *Id.* One of the ways to preserve the number and contour of the present circuits would be to adopt a system for discretionary access to federal courts at both the trial and the appellate levels so as to reallocate jurisdiction between the state and federal courts. The discretion to provide access would be vested in the federal courts and would be exercised for individual cases in designated categories. See Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761, 770-76 (1989) (analyzing proposal for discretionary access to federal courts).

⁹⁹ STUDY COMMITTEE REPORT, *supra* note 70, at 10.

¹⁰⁰ *Id.* at 120.

¹⁰¹ *Id.* at 121.

¹⁰² *Id.* at 122.

Washington and Hawaii, as well as the territory of Guam.¹⁰³ With twenty-eight active judges, the Ninth Circuit is authorized eleven more judges than is the court with the next highest number of judges.¹⁰⁴ Circuits with more than fifteen members may perform their in banc functions by such number of their members as may be prescribed by court rule,¹⁰⁵ and the Ninth Circuit has adopted a rule providing for an in banc court to consist of ten randomly selected judges and the chief judge.¹⁰⁶ The Study Committee notes that the Ninth Circuit "apparently manages effectively" and is said by "some observers" to be "not unduly troubled by intracircuit conflicts."¹⁰⁷ The Committee took no position on the recurring question of whether the Ninth Circuit should be split,¹⁰⁸ observing only that "we would let more time pass before definitively concluding that larger circuits are unworkable."¹⁰⁹

The organization of courts and of panels within courts by subject matter has been the subject of discussion for some time. In 1975, three distinguished scholars, long-time observers of the federal appellate landscape, wrote: "In organizing large courts to perform first-level review, greater use should be made of subject matter docket assignments, generalized courts with exclusive subject matter jurisdiction, and specialized courts with generalized judges."¹¹⁰ Despite the obvious advantages of specialization—expertise, expedition and efficiency—the subject-matter structure is not a popular one. In the survey conducted by the Study Committee, sixty percent of the circuit judges responding opined that the addition of more specialized courts would be either "undesirable" or "very undesirable."¹¹¹ There is reason to believe that the negative reaction would be even higher among the judges of the Second Circuit.

Although it may be argued that specialization is widespread in modern society, that subject-matter courts have operated successfully in continental judicial systems, and that there have been suc-

¹⁰³ 28 U.S.C. § 41 (1988).

¹⁰⁴ *Id.* § 44(a).

¹⁰⁵ *Id.* § 46(c); Act of Oct. 20, 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633.

¹⁰⁶ 9TH CIR. R. 35-3.

¹⁰⁷ STUDY COMMITTEE REPORT, *supra* note 70, at 122.

¹⁰⁸ *Id.* at 123; see also Baker, *A Background Paper on the Circuit Boundaries of the United States Courts of Appeals*, in 2 WORKING PAPERS, *supra* note 24, at 16-25.

¹⁰⁹ STUDY COMMITTEE REPORT, *supra* note 70, at 122.

¹¹⁰ P. CARRINGTON, D. MEADOR & M. ROSENBERG, *JUSTICE ON APPEAL* 230 (1976).

¹¹¹ Gallard & Wood, *supra* note 83, at 9.

cessful specialized courts in America, the arguments have not proved persuasive to the bench and bar. The Study Committee has recognized "that most American lawyers find the idea of specialized courts repugnant."¹¹² The Committee itself finds a number of problems inherent in the specialized structure: "the danger of tunnel vision, the danger of 'capture' . . . by the interest group most concerned with [the] court's specialty, the danger of political imbalance . . . , the problem of the case that raises issues within the purview of more than one specialized court, the danger of premature suppression of diverse views."¹¹³ Beyond these problems and disadvantages, the Committee foresees the possibility of an extra tier of appellate review—a supreme specialized court below the Supreme Court to resolve conflicts among the regional specialized courts.

The Study Committee specifically rejected proposals for one type of specialized court, apparently deeming it even unworthy of further study—an article III court of administrative appeals having exclusive jurisdiction to review all federal administrative agency orders. The rejection was grounded on concern that such a court could not be administered effectively because of its size. While 2,618 administrative agency cases came directly to the federal courts of appeals in 1990 (206 to the Second Circuit),¹¹⁴ hardly unmanageable numbers, many more administrative cases are filed in the district courts each year. It is estimated that there are five to eight times as many such cases filed in the district courts as in the circuit courts. Accordingly, a large, multidivisional court would be required, causing the Committee to conclude that "[t]he gains of such centralization are not worth these costs."¹¹⁵ Although much work in the administrative law area already is concentrated in the Court of Appeals for the District of Columbia Circuit, the Committee rejected a proposal to designate that court as the specialized administrative court. Also rejected was a proposal to authorize the D.C. Circuit to sit in banc to review the administrative decisions of other circuits. Either proposal would result in a greatly enlarged court, and the latter proposal would establish an extra tier of review, with "only incremental gains in uniformity."¹¹⁶

¹¹² STUDY COMMITTEE REPORT, *supra* note 70, at 11.

¹¹³ *Id.*

¹¹⁴ WORKLOAD STATISTICS, *supra* note 29, at 20.

¹¹⁵ STUDY COMMITTEE REPORT, *supra* note 70, at 73.

¹¹⁶ *Id.*

As part of the Committee Report, four members filed an "additional statement" expressing their concern "at the possibility that the committee's identification of several radical models for alternative court structures will be misinterpreted by observers as tacit approval of one or some of them" as well as their "hope that their presentation here for further study does not lend them a legitimacy to which they are not yet entitled."¹¹⁷ While the four members making the separate statement did not oppose the Committee's recommendations for further study of alternative structures, they did identify a number of matters that they felt should be given priority: analysis of *pro se* filings to determine whether they have inflated the caseloads of the appellate courts; improved case management techniques; and the length of appeals court opinions. They complained that insufficient attention was given to less radical measures. Their complaint is not well-founded, however, because the Committee does support less radical measures, including procedural adjustments.

B. Procedure

The Federal Courts Study Committee suggests a number of changes in district court procedure. Some of these changes would, of course, lessen the flow of cases to the courts of appeals and will therefore be examined briefly in this section. As to adjustments in appellate procedure, the Committee made some recommendations in the area of the decisional process, which will be examined in the next section. Beyond that, the only recommendations on the subject of appellate procedure were that "serious attention" be given to the subject "over the next five years" and that a study be undertaken to determine the feasibility of establishing a discretionary review procedure in the courts of appeals.¹¹⁸ Discretionary review would enable the circuits to control their dockets through a device similar to the writ of certiorari employed by the Supreme Court.¹¹⁹ The Committee observed that such a procedure has been adopted in several states and in the United States Court of Military Appeals. Some commentators have concluded that, as long as an appellate court having discretionary review is committed to the error-

¹¹⁷ *Id.* at 124.

¹¹⁸ *Id.* at 116.

¹¹⁹ See 28 U.S.C. § 1254 (1988) (Supreme Court reviews cases from courts of appeals by writ of certiorari and certification of question).

correcting as well as the lawmaking function, there is not much real difference between denial of review and summary affirmance.¹²⁰

Despite the call for further study, the report identifies more negatives than positives in the proposals for discretionary review. Emphasis is placed on the time and effort required for a comprehensive examination of the record to serve the error-correcting function. Such time and effort could just as well be expended in arriving at a summary disposition after full submission of the appeal. The report notes the possibility of combining certiorari-type review in the courts of appeals with first instance review by a panel of two or three district judges acting as an appellate division in the district court. The Supreme Court never has held that there is a right to an appeal, but it has required that the procedures used in handling appeals must comply with the due process and equal protection clauses of the Constitution whenever appeals are provided.¹²¹ At present, one appeal as of right is afforded to litigants in almost every state court system as well as in the federal system. The Committee acknowledges that changing to a discretionary review procedure for a first appeal "would be a major departure from our tradition."¹²² Yet, fifty-nine percent of the circuit judges responding to the Committee's question—"If caseload increases, would you favor eliminating appeal as of right, and accepting appeals only by leave of court?"—answered "yes."¹²³

The Second Circuit utilizes a modified form of discretionary review that has proved to be quite successful. In the case of *pro se* motions by state prisoners for certificates of probable cause in habeas corpus cases,¹²⁴ and by prisoners and others for leave to proceed *in forma pauperis*,¹²⁵ and for the appointment of counsel,¹²⁶ the practice is for the court to notify movants that not only

¹²⁰ See Lanza, *Discretionary Review*, in 2 WORKING PAPERS, *supra* note 24, at 12 & n.20.

¹²¹ See *Evitts v. Lucey*, 469 U.S. 387, 393 (1985).

¹²² STUDY COMMITTEE REPORT, *supra* note 70, at 116.

¹²³ Gallard & Wood, *supra* note 83, at 9.

¹²⁴ See FED. R. APP. P. 22(b).

¹²⁵ See *id.* rule 24(a). Some courts have adopted a rule requiring payment of a portion of the filing fee in an effort to ensure the good faith of prisoners challenging the conditions of confinement. See T.E. WILLGING, PARTIAL PAYMENT OF FILING FEES IN PRISONER IN FORMA PAUPERIS CASES IN FEDERAL COURTS: A PRELIMINARY REPORT (Federal Judicial Center 1984). But see *In re Epps*, 888 F.2d 964, 965 (2d Cir. 1989) ("Congress has permitted indigent persons to bring lawsuits . . . without prepayment of filing fees").

¹²⁶ See 28 U.S.C. § 1915(d) (1988).

may these motions be denied, but the appeals may be dismissed at the same time. The motions in effect bring the merits of the appeals up for preliminary review. Most of the cases in which these appeals are pursued involve challenges to state convictions,¹²⁷ state prison conditions of confinement,¹²⁸ federal sentences,¹²⁹ and federal prison conditions.¹³⁰ Each *pro se* application is scrutinized by staff clerks, who forward their recommendations, along with the moving papers and pertinent parts of the record, to a three-judge motions panel.¹³¹ The applications are reviewed, without briefing or oral argument, by the panel, which dismisses frivolous or malicious appeals without further ado.¹³² Appeals considered to have merit are returned to the regular calendar, with appropriate rulings on the motions, for full briefing. Five hundred and eighty-eight prisoners' appeals were filed in the Second Circuit in 1990,¹³³ and it is estimated that a large number of these were disposed of through the truncated procedure described. This procedure has resulted in considerable savings in time and effort and is an important factor in the expeditious processing of appeals in the Second Circuit.

One of the most important procedural adjustments recommended by the Committee is the expanded use of alternate dispute resolution ("ADR") mechanisms. The legislation creating the Study Committee specifically directed the assessment of ADR methods,¹³⁴ and the Committee devoted considerable attention to the subject. The use of ADR by the courts as a means of alleviating the caseload burden has been growing for some time. Rule 16(c)(7)

¹²⁷ See *id.* § 2254.

¹²⁸ See 42 U.S.C. § 1983 (1988); see also *Wilson v. Seiter*, 111 S. Ct. 2321 (1991).

¹²⁹ See 28 U.S.C. § 2255 (1988).

¹³⁰ See *Fisher v. Koehler*, 902 F.2d 2, 3 (2d Cir. 1990) (class action by prison inmates against prison officials alleging prison conditions violated eighth amendment).

¹³¹ 2d Cir. R. 27(b).

¹³² 28 U.S.C. § 1915(d) (1988). A very recent innovation in the Second Circuit Court of Appeals is the *sua sponte* calendar, prepared by the clerk and forwarded to a regular panel. This procedure allows *sua sponte* dismissal of cases in which represented parties appeal from non-appealable orders. Whether this procedure will be extended to frivolous appeals is an open question.

Another means of discouraging frivolous appeals is by the use of the sanctioning process, at both the district court level and the appellate level. See FED. R. CIV. P. 11; FED. R. APP. P. 38; 28 U.S.C. § 1912; see also T.E. WILGING, *THE RULE 11 SANCTIONING PROCESS* (Federal Judicial Center 1988); Kaufman, *Safeguarding Judicial Resources: The Joint Duty of Bench and Bar*, 52 BROOKLYN L. REV. 579, 582-586 (1986).

¹³³ 1990 SECOND CIRCUIT REPORT, *supra* note 36, at 4.

¹³⁴ See Federal Courts Study Act, *supra* note 54, § 102(b)(2)(A).

of the Federal Rules of Civil Procedure provides that the participants at any pretrial conference "may consider and take action with respect to . . . the use of extrajudicial procedures to resolve the dispute."¹³⁵ Among the extrajudicial procedures to which the courts have directed litigants are summary jury trials, in which counsel present to a jury only designated exhibits and their own arguments as to anticipated evidence;¹³⁶ mediation, in which court-appointed mediators endeavor to induce the parties to settle;¹³⁷ mini-trials, where each side's case is presented before the parties themselves in an effort to provoke settlement;¹³⁸ and court-annexed arbitration.¹³⁹ Whether a district court may invoke rule 16 to require the use of one or more ADR devices is at least questionable.¹⁴⁰

Congress has enacted legislation providing for court-annexed arbitration ("CAA") in ten specified district courts, including the Eastern District of New York in the Second Circuit.¹⁴¹ The same legislation authorized CAA in ten additional districts to be designated by the Judicial Conference of the United States and directed that the Federal Judicial Center prepare a report on the effectiveness of CAA programs in the districts in which they are used.¹⁴² The Study Committee recommends that Congress eliminate any doubt that ADR mechanisms may be adopted by local rule by enacting appropriate enabling legislation.¹⁴³ However, the Committee

¹³⁵ FED. R. CIV. P. 16(c)(7).

¹³⁶ See M. JACOBOWITZ & C. MOORE, SUMMARY JURY TRIALS IN THE NORTHERN DISTRICT OF OHIO (Federal Judicial Center 1982).

¹³⁷ See K. SHUART, THE WAYNE COUNTY MEDIATION PROGRAM IN THE EASTERN DISTRICT OF MICHIGAN (Federal Judicial Center 1984); K. TEGLAND, MEDIATION IN THE WESTERN DISTRICT OF WASHINGTON (Federal Judicial Center 1984).

¹³⁸ See Green, *Growth of the Mini-Trial*, 9 LITIG. 12, 18 (Fall 1982) ("key point is that the mini-trial is nothing more than a carefully structured settlement proposal").

¹³⁹ See ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 39-40 (1984); E.A. LIND & J. SHAFARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS (Federal Judicial Center 1981); Nejelski & Ray, *Alternatives to Court and Trial*, in THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 263 (F. Klein ed. 1981).

¹⁴⁰ See *Strandell v. Jackson County*, 838 F.2d 884, 886-88 (7th Cir. 1987) (federal district court may not force parties to participate in summary jury trial).

¹⁴¹ 28 U.S.C. §§ 651(a), 658(1) (1988).

¹⁴² See *id.* § 658(2). Two of those districts are the Western and Northern Districts of New York.

¹⁴³ STUDY COMMITTEE REPORT, *supra* note 70, at 83. The benefit of ADR and other methods designed to expedite and reduce the expense of litigation is discussed in Rowe, *American Law Institute Study on Paths to a "Better Way": Litigation, Alternatives, and Accommodation*, 1989 DUKE L.J. 824, 886-902 (background paper illustrating possible uses

would not *require* the adoption of specific ADR rules by any court, allowing local conditions to dictate which, if any, ADR techniques should be adopted. Decisions about permissible cost and fee incentives—the imposition of costs and fees upon those who reject ADR awards or fail to improve upon them after trial—should be left to Congress, in the Committee's view.¹⁴⁴ Also recommended is authorization and funding "for sustained experimentation with alternative and supplementary techniques," subject to appropriate guidelines.¹⁴⁵ Most interesting, and relevant to the plans of the Second Circuit Court of Appeals, is the Committee's suggestion that ADR mechanisms should be available to supplement *appellate* as well as trial procedures.¹⁴⁶

Recognized by the Committee is the serious concern of many "that ADR techniques may be perceived to promote a system of second-class justice, whereby litigants with modest resources are . . . shunted aside to inferior alternative procedures."¹⁴⁷ Participation by the public, the bar, and ADR professionals in the development of appropriate legislation and rules all are seen as a means of dispelling the perception, which may be groundless in any event. There is in fact good reason to believe that "litigants like ADR and think it produces fair outcomes."¹⁴⁸ However true this may be, it appears that ADR mechanisms are not widely invoked by judges. The Standing Committee on the Improvement of Civil Litigation of the Second Circuit Judicial Council reported the following: "Despite the effectiveness of . . . ADR procedures in appropriate cases, few trial judges in this Circuit have used them or recommended their use to litigants. . . . [T]he reluctance of most judges seems to be based on . . . their lack of experience or familiarity with such procedures."¹⁴⁹

Among the district courts in the Second Circuit, the District of

and misuses of ADR). For an early study of court-annexed arbitration, see E.A. LIND & J. SHAPARD, *supra* note 139.

¹⁴⁴ STUDY COMMITTEE REPORT, *supra* note 70, at 84.

¹⁴⁵ *Id.* at 85.

¹⁴⁶ *Id.* at 83.

¹⁴⁷ *Id.* at 84.

¹⁴⁸ Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 FORDHAM L. REV. 1, 29 (1990).

¹⁴⁹ STANDING COMMITTEE ON THE IMPROVEMENT OF CIVIL LITIGATION, SETTLEMENT PRACTICES IN THE SECOND CIRCUIT 76 (Oct. 13, 1988) [hereinafter SETTLEMENT PRACTICES] The Standing Committee on the Improvement of Civil Litigation is a committee of the Judicial Council of the United States Court of Appeals for the Second Circuit.

Connecticut has adopted a Special Masters Program, the Eastern District has adopted mandatory court-annexed arbitration, and the Southern District employs a voluntary ADR technique involving reference to the American Arbitration Association ("AAA"). The Connecticut procedure calls for the appointment of two attorneys as special masters to conduct a settlement conference in each case, review settlement memoranda, and file a conference report with the court.¹⁵⁰ Apparently, fifty percent of all cases referred to special masters under this procedure are settled.¹⁵¹

The Eastern District Arbitration Plan is compulsory for all civil cases, except social security and prisoners' rights cases, in which money damages do not exceed \$100,000, exclusive of interest and costs.¹⁵² Attorney-arbitrators sit in panels of three, and judgment is entered upon their award unless trial *de novo* is demanded within thirty days following entry of the award.¹⁵³ An amount equal to the fees of the arbitrators is deposited if trial is demanded (except for litigants proceeding *in forma pauperis*), to be returned only if a judgment more favorable than the award is obtained.¹⁵⁴ This procedure has had a success record of over forty percent.¹⁵⁵ The Southern District procedure requires only that the parties attend a conference conducted by the AAA, if ordered to do so by the court, "to explore resolution of [the] dispute by arbitration, mediation or other method of alternative dispute resolution (ADR)."¹⁵⁶ If the parties choose arbitration, they must execute a stipulation agreeing to that method of dispute resolution and consenting to the dismissal of the action. Apparently, because of the voluntary nature of this procedure, fewer cases have been processed for ADR in the Southern District than in the Eastern District. In the entire period from 1984 to 1990, only thirteen judges had referred 162 cases to the ADR program in the Southern District, with a disposal rate of thirty-eight percent.¹⁵⁷ Whatever

¹⁵⁰ D.C. CONN. R. 28(d).

¹⁵¹ SETTLEMENT PRACTICES, *supra* note 149, at 32.

¹⁵² *Id.* at 23.

¹⁵³ *Id.* at 25-26.

¹⁵⁴ *Id.* at app. E, Eastern District of New York Exhibit A (Local Arbitration Rule § 7(d)).

¹⁵⁵ *Id.* at 26.

¹⁵⁶ *Id.* at app. E, Southern District of New York (memorandum to counsel for the parties).

¹⁵⁷ 1990 ANNUAL REPORT OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK 30.

its success rate in the district courts of the Second Circuit, ADR has lessened the flow of cases to the Second Circuit Court of Appeals, and, with greater understanding of its potential by the bench and bar, promises to be an even greater factor in "averting the flood"¹⁵⁸ in the future.

Other recommendations made by the Study Committee that would stem the flow to the courts of appeals involve the adoption of new procedures to create additional capacity within the judicial branch. One such recommendation relates to the system of tax litigation; another pertains to appeals in bankruptcy cases; and a third deals with the processing of claims under the Federal Tort Claims Act. Finding "irrational" the present system of federal tax adjudication—the option to pay the tax and sue for refund in the district court or in the Claims Court; or to decline to pay and contest the deficiency in the Tax Court—the Committee would create "an Article III appellate division of the United States Tax Court with exclusive jurisdiction over appeals in federal income, estate, and gift taxes," with the initial tax litigation conducted before article I judges in a Tax Court trial division as at present.¹⁵⁹ Four members of the Committee dissented from this proposal, noting the effective blending of the specialist and generalist qualities in the present system, the danger of centralizing substantive tax disputes, the satisfactory operation of present procedures, and widespread opposition to the proposal.¹⁶⁰ It appears to this author that the procedure proposed by the Committee would effect very minimal changes in the caseloads of the Second Circuit Court of Appeals, where petitions to review tax court decisions and appeals from the district court in tax refund cases are few in number.

Section 158(b) of title 28 of the United States Code allows the judicial council of a circuit to establish a bankruptcy appellate panel, consisting of three bankruptcy judges, to review the decisions of bankruptcy judges. The review must be by consent of all parties and the district judges for the district must authorize the procedure. Where these panels are established, their decisions are reviewed by the courts of appeals.¹⁶¹ Except for two circuits in

¹⁵⁸ Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634, 634 (1974).

¹⁵⁹ STUDY COMMITTEE REPORT, *supra* note 70, at 69.

¹⁶⁰ *Id.* at 71-72.

¹⁶¹ 28 U.S.C. § 158(a), (d) (1988).

which the system has been adopted,¹⁶² the appellate route continues to be: bankruptcy court to district court to court of appeals. The Study Committee would establish bankruptcy panels in each circuit, with the right afforded to the parties to opt out of the procedure; appeals to the circuit courts from the appellate panels would be limited to constitutional issues and questions of law.¹⁶³ Three Committee members dissented from the recommendation, citing the heavy caseloads now borne by bankruptcy judges (who would staff the panels) and the weakening of the ability of the district courts to oversee the work of the bankruptcy courts.¹⁶⁴ The Second Circuit has declined to establish bankruptcy appellate panels under the present system and is unlikely to do so in the foreseeable future, a manageable number of 104 appeals to the Second Circuit in bankruptcy matters having been filed in 1990.¹⁶⁵ Even less likely is Second Circuit support for the procedure recommended by the Study Committee.

The small claims procedure suggested by the Study Committee is worthy of consideration by the Second Circuit because it provides a fairly simple and effective means of lessening the caseload while simplifying matters for litigants. It requires Congress to "establish a \$10,000 minimum jurisdictional amount for federal tort claims . . . and establish a small-claims procedure for claims below the minimum."¹⁶⁶ The Federal Tort Claims Act allows suits against the United States for the torts of its employees with no minimum limits, and local tort law is applied in adjudicating those claims.¹⁶⁷ The small claims cases could be heard by an independent tribunal, a tribunal established in the Justice Department or in the agency against which the claim is made, the United States Claims Court, or in district court divisions administered by magistrates.¹⁶⁸ It seems apparent that the Study Committee is convinced that its recommendations for procedural adjustments have more potential for enhancing the operation of the federal court

¹⁶² See STUDY COMMITTEE REPORT, *supra* note 70, at 74 (First and Ninth Circuits have established bankruptcy panels).

¹⁶³ *Id.* at 74-75.

¹⁶⁴ *Id.* at 76.

¹⁶⁵ WORKLOAD STATISTICS, *supra* note 29, at 20. Bankruptcy court filings in the Second Circuit totalled 36,327 in 1990, representing an increase of 40% over 1989. *Bankruptcies Rise Dramatically in East*, Nat'l L.J., Apr. 8, 1991, at 6, col. 1.

¹⁶⁶ STUDY COMMITTEE REPORT, *supra* note 70, at 81.

¹⁶⁷ 28 U.S.C. § 2674 (1988).

¹⁶⁸ STUDY COMMITTEE REPORT, *supra* note 70, at 81.

system than further improvements in case management techniques.

C. Case Management

The Second Circuit Court of Appeals long has been at the forefront in the development of innovations for court management. Those innovations, combined with the hard work of each of the judges, have enabled the court to keep current in its work over a period of many years. One of the case management techniques that originated in the Second Circuit is the Civil Appeals Management Plan ("CAMP"), which has been held up as a model for other circuits.¹⁶⁹ CAMP is designed to encourage the settlement of cases on appeal before argument, to narrow the issues for appeal, and to expedite the appeals process. CAMP works this way: Within ten days after filing the notice of appeal or petition for review or enforcement, the appellant or petitioner must file a civil appeal preargument statement along with an order for the transcript and copies of the judgment, order, or decision appealed from.¹⁷⁰ Thereafter, one of the two staff counsel, who devote their full time to CAMP matters, may direct the attorneys to attend a preargument conference to explore settlement possibilities, simplify the issues, or discuss any matters related to the expeditious disposition of the appeal.¹⁷¹ Guidelines for the conduct of preargument conferences have been adopted and provide, among other things, for good faith participation by attorneys and, in some cases, their clients.¹⁷² Conference discussions are confidential and may not be disclosed to any member of the court.¹⁷³ As soon as practicable, staff counsel

¹⁶⁹ See Partridge & Lind, *A Reevaluation of the Civil Appeals Management Plan*, in *FEDERAL JUDICIAL CENTER, MANAGING APPEALS IN FEDERAL COURTS* (M. Tonry & R.A. Katzman ed. 1988); Kaufman, *Must Every Appeal Run the Gamut?—The Civil Appeals Management Plan*, 95 *YALE L.J.* 755, 755-57 (1986). For further information on CAMP in addition to a discussion of various proposals for other procedural adjustments and structural alternatives in federal appeals courts, see A.B.A. *STANDING COMMITTEE ON FEDERAL JUDICIAL IMPROVEMENTS, THE UNITED STATES COURTS OF APPEALS: REEXAMINING STRUCTURE AND PROCESS AFTER A CENTURY OF GROWTH* (1989). For a discussion of the technique used by the Sixth Circuit, see J. EAGLIN, *THE PRE-ARGUMENT CONFERENCE PROGRAM IN THE SIXTH CIRCUIT COURT OF APPEALS* (Federal Judicial Center 1990). The Tenth Circuit Court of Appeals now is planning a program patterned after the Sixth Circuit plan. *Mediation Plan Set*, *Nat'l L.J.*, Apr. 8, 1991, at 6, col. 1.

¹⁷⁰ *CIVIL APPEALS MANAGEMENT PLAN* rule 3, in 2d Cir. R. [hereinafter C.A.M.P. R.].

¹⁷¹ C.A.M.P. R. 5.

¹⁷² See *GUIDELINES FOR CONDUCT OF PRE-ARGUMENT CONFERENCE*, in 2d Cir. R.

¹⁷³ *Lake Utopia Paper Ltd. v. Connelly Containers, Inc.*, 608 F.2d 923, 930 (2d Cir.

will issue a scheduling order setting forth dates for the filing of the record on appeal, briefs and appendix, and designating the week during which the argument of the appeal will be heard.¹⁷⁴ The dates prescribed by the scheduling order do not necessarily conform to the filing dates set forth in the Federal Rules of Appellate Procedure.¹⁷⁵ In 1989, the CAMP program was responsible for the disposition of 601 cases without briefs or appellate argument, a number representing nearly twenty percent of the total appeals terminated in the Second Circuit Court of Appeals.¹⁷⁶

The management of criminal appeals in the Second Circuit is governed by the *Revised Second Circuit Plan to Expedite the Processing of Criminal Appeals*. In the case of any defendant found guilty after trial, the district judge must complete and transmit to the district court clerk for transmittal to the court of appeals a form containing the following information: sentencing data; whether any transcripts were ordered during trial; whether defendant is eligible for appointment of counsel on appeal pursuant to the Criminal Justice Act;¹⁷⁷ whether there is any reason why trial counsel should not be continued on appeal; and whether the trial minutes should be transcribed at the government's expense.¹⁷⁸ At the time the notice of appeal is filed, counsel for the appellant must furnish a form certifying that the transcript has been ordered and satisfactory arrangements have been made for the payment of its cost.¹⁷⁹ When a transcript has been ordered, the court reporter must notify the clerk of the court of appeals "immediately" of the estimated length of the transcript and the estimated date of completion; the time for completion "shall not exceed 30 days from the order date except under unusual circumstances which first must be approved by the Court of Appeals upon a showing of need."¹⁸⁰

As soon as possible after the notice of appeal is filed in a criminal case, a scheduling order is issued in the court of appeals providing that the record on appeal be docketed within twenty days after filing of the notice of appeal; that the appellant's brief and

1979), *cert. denied*, 444 U.S. 1076 (1980).

¹⁷⁴ C.A.M.P. R. 4.

¹⁷⁵ See, e.g., FED. R. APP. P. 31(a) (designating time for serving and filing briefs).

¹⁷⁶ Kaufman, *supra* note 148, at 11.

¹⁷⁷ 18 U.S.C. § 3006A (1988).

¹⁷⁸ REVISED SECOND CIRCUIT PLAN TO EXPEDITE THE PROCESSING OF CRIMINAL APPEALS rule 1, in 2d CIR. R.

¹⁷⁹ *Id.* rule 3.

¹⁸⁰ *Id.* rule 4.

appendix be filed not later than thirty days after the date on which the transcript is scheduled to be filed, unless a longer or shorter period is established for good cause shown; that the appellee's brief be filed not later than thirty days after the date on which appellant's brief and appendix are scheduled to be filed, unless a different period is fixed for good cause; and that the argument will be heard during the week designated in the scheduling order.¹⁸¹ The court of appeals may enter any other order deemed necessary for the prompt disposition of appeals, including: appointing counsel on appeals; setting a date for filing transcriptions of trial minutes; requiring attorneys for co-appellants to share a copy of the transcript; and instructing the clerk to permit counsel to remove and examine the record.¹⁸² Strict adherence to the scheduling requirements provided has enabled the *Revised Second Circuit Plan to Expedite the Processing of Criminal Appeals* to play an important role in case management in the Second Circuit.¹⁸³

The courts of appeals have been flexible and resourceful in regard to new case management techniques. Yet, the Study Committee seems reluctant to concede that much more benefit will be derived from experimenting with new approaches to case management: "Although we believe that per judge productivity is close to the maximum, and that further acceptable efforts to enhance productivity will yield sharply diminishing returns, some benefits may still come from additional case management innovations."¹⁸⁴ The Committee does at least recommend that the Judicial Conference conduct a study of the most effective techniques for managing cases and provide a means for courts regularly to exchange information, experience, and ideas in this area. The Study Committee Report offers the following possibilities: an appellate commissioner program utilized in the Washington Supreme Court; a computerized system of issue classification being tried in the Ninth Circuit; experimentation with two-judge panels; and the use of settlement and case-expediting programs already in place in some of the circuits.¹⁸⁵ It seems to this author that the Committee was too pessi-

¹⁸¹ *Id.* rule 5.

¹⁸² *Id.* rule 6.

¹⁸³ See Flanagan, *The Central Legal Staff and the Revised Plan to Expedite the Processing of Criminal Appeals: Unheralded Aspects of the Second Circuit's Proud Tradition of Excellence*, in FEDERAL BAR COUNCIL, *DISTINCTIVE PRACTICES OF THE SECOND CIRCUIT* 161 (1989).

¹⁸⁴ STUDY COMMITTEE REPORT, *supra* note 70, at 115.

¹⁸⁵ *Id.* at 115-16.

mistic about the ability of the courts to develop new and innovative case management techniques and to apply old ones not yet employed in particular circuits. Experimentation and research in court administration is ongoing and should be encouraged.¹⁸⁸ There yet is sufficient flexibility in the system to accommodate new ideas in this area.

Despite the speed of its dispositions,¹⁸⁷ the judges of the Second Circuit recently became concerned with the court's newly found shortfall—its inability to dispose as many appeals as were filed in 1989 and 1990.¹⁸⁸ Accordingly, Chief Judge James L. Oakes in October 1990 appointed a three-judge committee to study long- and short-term solutions to the sharp increases in the number of appeals filed and in the consequent shortfall.¹⁸⁹ The committee was charged with the task of considering such alternatives as the screening of cases to reduce oral argument and seeking additional judges. The committee's temporary solution, additional sitting days for each judge, combined with a slight drop in filings, seems to have resolved the problem for the moment.¹⁹⁰ The Second Circuit is the only circuit that still does not use a case management technique that involves the screening of cases to eliminate oral argument where certain conditions are met. The Second Circuit has resisted the implementation of such a case management technique because of the circuit's deeply-rooted tradition of oral argument. Oral argument remains available to all who seek it, except in the cases of incarcerated prisoners who seek to argue *pro se*, mandamus applications, and criminal appeals where an *Anders*¹⁹¹ brief is

¹⁸⁸ See Miner, *Research in Judicial Administration: A Judge's Perspective*, 12 JUST. SYST. J. 8, 14 (1987); see also ADVISORY COMMITTEE ON EXPERIMENTATION IN THE LAW, FEDERAL JUDICIAL CENTER, *EXPERIMENTATION IN THE LAW* 1-6 (1981) (discussing role of experimentation in American Justice System). The Chief Justice established a Judicial Conference Committee on Court Administration and Case Management in September 1990 to assess the need for changes in court management and administration. See Parker, *Working for Improved Case Management in the Federal Courts*, 23 THE THIRD BRANCH, May 1991, at 6.

¹⁸⁷ See *supra* notes 41-43 and accompanying text.

¹⁸⁸ See *supra* notes 39-40 and accompanying text. One of the important case management techniques of the Second Circuit is "a flexible calendar policy that includes adding extra cases to established panels and adding new panels if needed." 1990 SECOND CIRCUIT REPORT, *supra* note 36, at 7.

¹⁸⁹ N.Y.L.J., Oct. 9, 1990, at 1.

¹⁹⁰ See *United States v. Delia*, 925 F.2d 574, 575 (2d Cir. 1991) (adjustments for filing briefs and oral arguments are disfavored due to volume undertaken by each judge as result of additional panel assignments); cf. Wise, *Circuit Court's Backlog Cut by 10 Percent*, N.Y.L.J., July 5, 1991, at 1, col. 3.

¹⁹¹ *Anders v. California*, 386 U.S. 738 (1967) (allowing counsel to be relieved upon sub-

filed by an attorney seeking to be relieved from representation. Argument times have been reduced to ten or fifteen minutes per side, except in multiparty cases involving complex issues.

The screening process, effectively used elsewhere, may yet need to be employed in the Second Circuit. There are many variations in the methods utilized for screening cases for decision without oral argument.¹⁹² This author has favored screening as a means of providing more time for the argument of the more significant cases, but those holding this view are in the minority in the Second Circuit. Those who contend that oral argument should be retained point to the bureaucratizing effect of the nonargument system as well as the importance of the perception that each litigant have a day in court.¹⁹³ The importance of appellate argument cannot be minimized. Of the circuit judges responding to questions posed by the Study Committee regarding oral argument, eighty-eight percent found oral argument either "very helpful" or "often helpful," and seventy-nine percent said their minds were changed either "often" or "sometimes."¹⁹⁴ Yet, it is important to note that the overwhelming number of responses to these questions came from circuits where easily-decided cases are screened out of the argument process.

This author has suggested to his colleagues that the Federal Judicial Center assist in a study of the situation in the Second Circuit with a view toward recommending a screening system that would be the most suitable for the needs of the court.¹⁹⁵ One system that might be effective requires staff attorney identification of nonargument cases in the first instance. The cases so identified would be referred to nonargument panels for disposition. Any judge on the disposition panel could require any case so referred to

mission of appropriate brief referring to anything that might arguably support appeal).

¹⁹² See generally J. CECIL & D. STIENSTRA, *DECIDING CASES WITHOUT ARGUMENT: A DESCRIPTION OF PROCEDURES IN THE COURTS OF APPEALS* (Federal Judicial Center 1985); *DECIDING CASES WITHOUT ARGUMENT: AN EXAMINATION OF FOUR COURTS OF APPEALS* (Federal Judicial Center 1987) (same authors); *THE ROLE OF STAFF ATTORNEYS AND FACE-TO-FACE CONFERENCING IN NON-ARGUMENT DECISIONMAKING* (Federal Judicial Center 1989) (same authors).

¹⁹³ See Feinberg, *Unique Customs and Practices of the Second Circuit*, 14 *HOFSTRA L. REV.* 297, 303-07 (1986).

¹⁹⁴ Gallard & Wood, *supra* note 83, at 12.

¹⁹⁵ See S. FLANDERS & J. GOLDMAN, *SCREENING PRACTICES AND THE USE OF PARA-JUDICIAL PERSONNEL IN THE U.S. COURTS OF APPEALS: A STUDY IN THE FOURTH CIRCUIT* (Federal Judicial Center 1974), reprinted in *FEDERAL JUDICIAL CENTER, MANAGING APPEALS IN FEDERAL COURTS* 641 (M. Tonry & R.A. Katzman ed. 1988).

be placed on the argument calendar. This author also has proposed that criminal cases in which only sentencing issues are raised be processed through the staff attorneys, who could forward them to a designated panel for disposition without oral argument. The sentencing jurisprudence is quite advanced in the Second Circuit, the court having considered a large number of sentencing cases since the effective date of the Sentencing Reform Act of 1984.¹⁹⁶ The Sentencing Guidelines ("Guidelines")¹⁹⁷ generated by the Sentencing Commission created by the 1984 Act were subject to much criticism by the judges testifying before the Study Committee, not only for the extra time now needed for sentencing hearings, but also because of the rigidity and adverse effects of guideline sentencing on plea negotiations.¹⁹⁸ The Study Committee endorsed no policy regarding changes in the Guidelines system but did "endorse serious consideration" of proposals that the Guidelines not be treated as compulsory rules but as general standards.¹⁹⁹ Three dissenters bluntly stated that "[t]he federal sentencing guidelines are not working,"²⁰⁰ and gave a number of reasons for the statement, the paramount reason being the impact on caseloads and the unfairness of the system. The dissenters noted in particular that "appeals of sentencing decisions, an insignificant percent of the appellate caseload prior to November 1, 1987, now amount to a significant part of the appellate courts' caseload."²⁰¹ Criticism of the Guidelines by the bar, for reasons unrelated to case management, is widespread.²⁰²

This author long has advocated the elimination of the "American Rule" requiring the payment of attorneys fees by the litigant incurring those fees, in favor of the "English Rule" requiring the losing party to reimburse the winning party for the fees incurred in the litigation.²⁰³ The English Rule would be applied in both trials and appeals and would not only serve the purposes of effective case management but also the purposes of simple fairness. It would re-

¹⁹⁶ See *supra* note 49 and accompanying text.

¹⁹⁷ U.S. SENTENCING COMM'N, GUIDELINES MANUAL (1990) [hereinafter U.S.S.G.].

¹⁹⁸ STUDY COMMITTEE REPORT, *supra* note 70, at 136-39.

¹⁹⁹ *Id.* at 135-36.

²⁰⁰ *Id.* at 141.

²⁰¹ *Id.*

²⁰² See, e.g., Rakoff, *An Attack on Sentencing Guidelines*, N.Y.L.J., May 11, 1990, at 3, col. 3 (Guidelines unfair because they do not permit judges to consider individual circumstances of "superficially similar crimes or criminals").

²⁰³ See Miner, *supra* note 51, at 257.

place the modest fee-shifting provision of rule 68 of the Federal Rules of Civil Procedure²⁰⁴ and the various specific fee-shifting statutes that have been enacted on a piecemeal basis.²⁰⁵ The question of where the responsibility for payment of fees should rest still is open to debate and, according to a Federal Judicial Center survey of five possible answers to the question, "[i]t remains difficult to distill . . . any simple conclusions about which attorney fee rule is likely to best facilitate settlement"²⁰⁶ The Study Committee specifically rejects "a general rule making losing parties fully liable for the winners' reasonable attorney fees [as] a radical measure that would be inconsistent with traditional American attitudes toward access to courts."²⁰⁷ In somewhat of a turnabout, however, the Committee acknowledges "possible benefits" in modifying the American Rule for "specific problems" and opines that "attorney fee-shifting may be appropriate in some circumstances such as discovery motions and in business litigation."²⁰⁸

An important case management device that has been in use in the Second Circuit Court of Appeals for some time is the sixty-day list.²⁰⁹ The list is comprised of all cases remaining undecided for a period of sixty days from the date of oral argument. The list is reviewed at the bimonthly meetings of the court, and the judge assigned as author is required to report on the status of his or her opinion.²¹⁰ The presiding judge of the panel that heard the case renders the report of the status of opinions assigned to a visiting or senior judge. All that is required is an oral status report—whether the opinion has been filed within the past few days, whether it is in circulation, or when it is expected to be completed. As one district judge said to this author: "Now, that's peer pressure!" In the same vein, it is a long-time tradition in the Second Circuit for a judge

²⁰⁴ FED. R. CIV. P. 68.

²⁰⁵ See, e.g., 28 U.S.C. § 1988 (1988) (court has discretion to award reasonable attorneys' fees to prevailing party in civil rights cases); 42 U.S.C. § 2412 (1988) (same).

²⁰⁶ J. SHAPARD, *THE INFLUENCE OF RULES RESPECTING RECOVERY OF ATTORNEYS' FEES ON SETTLEMENT OF CIVIL CASES* 45 (Federal Judicial Center 1984); see also A.J. TOMKINS & T.E. WILLING, *TAXATION OF ATTORNEYS' FEES: PRACTICES IN ENGLISH, ALASKAN, AND FEDERAL COURTS* (Federal Judicial Center 1986). See generally Donohue, *Opting for the British Rule, or if Posner and Shavell Can't Remember the Coase Theorem, Who Will?*, 104 HARV. L. REV. 1093 (1991) (discussing various theories of rules on recovery of attorneys' fees and their failings).

²⁰⁷ STUDY COMMITTEE REPORT, *supra* note 70, at 105.

²⁰⁸ *Id.*

²⁰⁹ See Feinberg, *supra* note 193, at 313.

²¹⁰ See J. MORRIS, *FEDERAL JUSTICE IN THE SECOND CIRCUIT* 194 (1987).

who receives a colleague's draft opinion to put aside whatever he or she is doing to give attention to the draft. Delay in the filing of opinions thus is avoided to the greatest extent possible.

The Study Committee Report gives a much greater degree of attention to matters of case management in the district court than it does to management in the courts of appeals. With respect to civil case management in the district courts, the Committee recommended "(1) early judicial involvement to control the pace and cost of litigation . . . , (2) phased discovery, (3) use of locally developed case management plans, and (4) additional training of judges in appropriate techniques of case management."²¹¹ Federal judges long have been aware of the advantages of early judicial involvement through the use of scheduling orders.²¹² The Committee also urged judges to take advantage of the rule permitting oral findings of fact and conclusions of law in civil bench trials as a means of effective case management.²¹³

On the criminal side, the Study Committee recommended further study of discovery issues in criminal cases and suggested that "[t]he Attorney General should convene a conference of prosecutors and defense lawyers to consider the problems of complex criminal trials."²¹⁴ Noted was the fact that the number of criminal trials lasting over forty days has quadrupled since 1979.²¹⁵ The Second Circuit Court of Appeals already has taken steps to deal with the multi-defendant, multi-count, multi-issue criminal trial. In *United States v. Casamento*,²¹⁶ the Second Circuit held that in cases where the trial is expected to last in excess of four months, the prosecutor must present a reasoned basis to support the conclusion that a joint trial of all defendants is more consistent with the fair administration of justice than some manageable division into separate groups of defendants.²¹⁷ Although the Second Circuit rule may result in more criminal trials, it does not for that reason make for ineffective case management. On the contrary, it serves the cause of effective management by saving time for lawyers, judges, and criminal defendants, avoiding problems with jury ser-

²¹¹ STUDY COMMITTEE REPORT, *supra* note 70, at 99.

²¹² See S. FLANDERS, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS (1977).

²¹³ FED. R. CIV. P. 52(a); see also STUDY COMMITTEE REPORT, *supra* note 70, at 102.

²¹⁴ STUDY COMMITTEE REPORT, *supra* note 70, at 106.

²¹⁵ *Id.* at 107.

²¹⁶ 887 F.2d 1141 (2d Cir. 1989).

²¹⁷ *Id.* at 1152; see also *United States v. Salerno*, 937 F.2d 797 (2d Cir. 1991).

vice encountered in lengthy trials, and reducing the possibility of error.

The massive caseloads generated by asbestos litigation in recent years have presented unique case management problems for district courts and courts of appeals in the Second Circuit and elsewhere. During the statistical year ending June 30, 1990, an average of 1,140 asbestos cases were filed each month, with the accumulated national backlog for the year totaling 30,401, a 20% increase in backlog over the previous year.²¹⁸ Various proposals for the management of these cases have been advanced,²¹⁹ but the sheer mass of cases remains overwhelming. A committee appointed by the Chief Justice of the United States has recommended that Congress adopt specific legislation to deal with asbestos litigation, but there seems to be little hope that any action will be taken.²²⁰ In the Second Circuit, state and federal judges have been working together in a joint attempt to manage asbestos litigation, and, in one instance, a settlement master has been appointed under joint federal-state auspices.²²¹ The overall asbestos litigation is but one aspect of a larger problem—the management of multiforum, multiparty litigation involving related claims in federal and state courts. The Study Committee has recommended that Congress amend the multidistrict litigation statute²²² to permit consolidated trials, as well as consolidated pretrial proceedings, based on minimal diversity jurisdiction.²²³ For now, the Judicial Panel on Multi-District Litigation is giving its attention to the issue of pretrial

²¹⁸ Labaton, *Judges Struggle to Control a Caseload Crisis*, N.Y. Times, Mar. 10, 1991, at D4, col. 4; *Judges See a Crisis in Heavy Backlog of Asbestos Cases*, N.Y. Times, Mar. 6, 1991, at A1, col. 3 (same author).

²¹⁹ See, e.g., T. WILLING, TRENDS IN ASBESTOS LITIGATION 2 (Federal Judicial Center 1987) (discussing "special [managerial] treatments [courts have] formulated to respond to the unique features of asbestos litigation").

²²⁰ See Labaton, *Judges Struggle to Control a Caseload Crisis*, *supra* note 218. See generally SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION (Mar. 1991).

²²¹ Wise, *Joint Federal-State Trial of Asbestos Cases Scrapped*, N.Y.L.J., Sept. 13, 1990, at 1; *Asbestos Cases Sent to a Special Master: More is Aimed at Settling Huge Backlog*, N.Y.L.J., Sept. 13, 1990, at 1 (same author). State-federal cooperation in case management generally is promoted through the State-Federal Councils, which assist in resolving scheduling conflicts and other tensions inherent in the dual court system. See Pratt, *The State of New York's State-Federal Judicial Council*, 3 Touro L. Rev. 1 (1986); Wallace, *Before State and Federal Courts Clash*, THE JUDGE'S JOURNAL 37 (A.B.A. Fall 1985).

²²² See 28 U.S.C. § 1407(a) (1988).

²²³ STUDY COMMITTEE REPORT, *supra* note 70, at 44.

management of asbestos cases nationwide.²²⁴ As more and more appeals come to the circuit courts in asbestos and other cases, attention is drawn to the decisional process in the courts of appeals.

D. Decisional Process

In the Second Circuit Court of Appeals, the decisional process begins long before oral argument, when each judge reviews each case assigned to the panel of which he or she is to be a member for the forthcoming sitting. Even before oral argument, therefore, each judge has a tentative impression of the way most of the cases should be decided. These views are subject to change by oral argument, by the views of colleagues expressed after oral argument, or by the unique "voting memoranda" that have been the custom in the Second Circuit for many years.²²⁵ Voting memoranda, although not employed as frequently now as in earlier times, provide the means for each judge on the panel to circulate his or her views to the other members of the panel.²²⁶ They are particularly useful to the judge assigned as author of an opinion and serve an important function in crystallizing the issues in the more complicated cases.

The decisional process continues as each opinion is written and circulated. From time to time, an author will be far along in drafting an opinion before coming to the realization that his or her position should be changed. "It won't write" is the phrase commonly used in this situation. The author then may persuade the other members of the panel of the rightness of the change of view, or the opinion must be reassigned. The senior active judge serving on the panel presides (unless the chief judge sits)²²⁷ and, if in the majority, assigns opinion-writing chores for each case. It is the custom to allow senior judges in the Second Circuit Court of Appeals to express their preference as to opinion-writing assignments. It has become the practice for the judge presiding to draft summary orders for the signature of the other members of the panel when a case is disposed of by that device. When a draft of a full opinion is completed, it is circulated among the judges of the panel for suggestions, objections, and responsive concurrences or dissents.

²²⁴ See Blum, *Untangling Asbestos Litigation*, Nat'l L.J., Mar. 18, 1991, at 1, col. 1.

²²⁵ Medina, *Foreword: The "Old" Second Circuit in 1951*, 53 ST. JOHN'S L. REV. 199, 200-01 (1979).

²²⁶ Feinberg, *supra* note 193, at 298.

²²⁷ 28 U.S.C. § 45(b); COMM. ON FEDERAL COURTS, ASS'N OF THE BAR OF THE CITY OF N.Y., *APPEALS TO THE SECOND CIRCUIT* 1 (6th ed. 1988).

A unique practice in the Second Circuit is the use of "tabs." No opinion is accepted for filing by the clerk in the Second Circuit without the signed tab of each judge on the panel (other than the author) attached to it.²²⁸ The tab indicates that the signer of the tab concurs in the opinion or concurs with a separate opinion or dissents with a separate opinion. Sometimes a tab is withheld until the author makes certain suggested changes that the judge withholding the tab deems necessary before he or she can concur. More often, the tab is forwarded with a memorandum of suggested changes deemed appropriate but not essential. A dissenter merely enters the fact of dissent on the tab and sends along the dissenting opinion to the author of the majority opinion for filing. The same practice prevails as to concurring opinions. The decisional process does not end after an opinion is filed, for the losing party is entitled to, and frequently does, request a rehearing by the panel.²²⁹ Upon receipt of the petition for rehearing, the panel once again is constrained to give attention to the case and to consider the grounds urged for rehearing. From time to time, the petition results in technical changes or even in substantive changes in the opinion. Rarely, however, is there an actual rehearing of oral argument before the original panel.

Decisionmaking continues when the entire court considers a suggestion for rehearing in banc.²³⁰ The suggestion most often is included in the petition for rehearing before the panel, and the petition is circulated along with the results of the vote taken by the panel for rehearing. Any member of the court in active service, and any senior judge who sat on the panel may respond to the "suggestion" or call for an in banc vote without a suggestion.²³¹ A vote then is taken, and the determination of whether there will be an in banc rehearing is made by a majority of the active judges.²³² In the Second Circuit, neither vacancies nor disqualifications are counted in determining the base on which a majority is calculated.²³³ It is customary for each judge eligible to vote to do so by a written memorandum giving reasons for the vote. In this way, the decisional process continues right up through the in banc rehearing, if

²²⁸ Feinberg, *supra* note 193, at 314.

²²⁹ See FED. R. APP. P. 40.

²³⁰ *Id.* rule 35(b).

²³¹ *Id.* rule 35(a).

²³² *Id.*

²³³ 2D CIR. R. 35.

granted, and the circulation of opinions for the in banc opinion.

The in banc process of decisionmaking is not highly favored in the Second Circuit. Two in banc decisions, in cases pertaining to the same issue and heard at the same time, were filed in 1989,²³⁴ and only one in 1990.²³⁵ As of this writing, one petition for rehearing in banc was granted in 1991 and one in banc decision is pending in a case argued in 1990.²³⁶ The general view of the judges of the court is that the in banc procedure is inefficient, that it detracts from collegiality, and that it is particularly unnecessary in a court that strictly adheres to precedent.²³⁷ In banc decisionmaking has not occurred as frequently in the Second Circuit as it has in the other circuits, but panel opinions sometimes are circulated to the full court before filing.²³⁸ Several in banc polls have been taken in the Second Circuit in recent months, and the rejection of in banc consideration by a majority of the court clearly indicates that the Second Circuit's distaste for this process continues.

The Study Committee recommends that

Congress should allow each court of appeals to perform its in banc functions by such number of the members of its in banc court as may be prescribed by rule of the court of appeals, except that the number should not be less than nine unless the court has fewer than nine authorized judgeships.²³⁹

As has been noted, the present rule is that circuits with more than fifteen members may perform their in banc functions by whatever number may be prescribed by the court.²⁴⁰ The Study Committee gives no real reason to allow smaller courts to perform their in banc function by fewer than all of the circuit judges. Those who

²³⁴ See *Beauford v. Helmsley*, 865 F.2d 1386 (2d Cir.) (in banc), *cert. denied*, 110 S. Ct. 539 (1989); *United States v. Indelicato*, 865 F.2d 1370 (2d Cir.) (in banc), *cert. denied*, 110 S. Ct. 56 (1989).

²³⁵ See *United States v. MacDonald*, 916 F.2d 766 (2d Cir. 1990) (in banc), *cert. denied*, 111 S. Ct. 1071 (1991).

²³⁶ See *Asherman v. Meachum*, 932 F.2d 137 (2d Cir.); *United States v. Chestman*, 903 F.2d 75 (2d Cir. 1990).

²³⁷ See Newman, *In Banc Practice in the Second Circuit, 1984-1988*, 55 BROOKLYN L. REV. 355, 369 (1989); *In Banc Practice in the Second Circuit: The Virtues of Restraint*, 50 BROOKLYN L. REV. 365, 383 (1984) (same author).

²³⁸ Newman, *In Banc Practice in the Second Circuit, 1984-1988*, *supra* note 237, at 367; see also *Kramer v. Time Warner, Inc.*, (No. 90-9014, slip op. (2d Cir. June 27, 1991)); *Germain v. Connecticut Nat'l Bank*, 926 F.2d 191 (2d Cir. 1991) (opinion circulated to all active judges before filing); *United States v. Castiglia*, 894 F.2d 533 (2d Cir. 1990) (same).

²³⁹ STUDY COMMITTEE REPORT, *supra* note 70, at 114-15.

²⁴⁰ See *supra* note 105 and accompanying text.

dissent from this recommendation observe that the views of the majority of circuit judges may not be reflected in an in banc decision in which fewer than all participate and that "failure to include some judges in the decision-making process risks a diminution in the quality of the decisions made."²⁴¹ It is interesting to note that 64% of those circuit judges responding to the Study Committee's question: "How do you react to the concept of a small en banc panel (i.e., less than a whole court)?" answered: "I would oppose such a panel."²⁴² Based on past reaction to in banc panels in general, it would seem safe to say that the percentage of judges opposed to smaller in bancs in the Second Circuit would be much higher.

The Study Committee devotes a considerable part of its efforts in dealing with the appellate caseload crisis to the issue of intercircuit conflicts. Recommended is a study by the Federal Judicial Center of the number and frequency of such conflicts, and an analysis of those that "are, by some objective criterion, truly 'intolerable' yet, for whatever reason, unlikely to be resolved by the Supreme Court."²⁴³ It is questionable just what purpose would be served by such a study. In any event, the Committee does propose a five-year experimental project to resolve intercircuit conflicts by having the Supreme Court refer selected cases to an in banc court of appeals to resolve the issue and thereby create a national precedent.²⁴⁴ Of course, the referral must be to a court of appeals not involved in the conflict issue, and rehearing or reconsideration could be sought in the Supreme Court.²⁴⁵ It is estimated that there were more than sixty intercircuit conflicts in 1988, but it is expected that the Supreme Court would refer a much smaller number each year.²⁴⁶ One Committee member dissents from so much of the proposal as would allow the Supreme Court a second crack at the case: "Once the Supreme Court refers a case to an in banc court of appeals for final disposition of the conflict issue, the Supreme Court should be prohibited from reviewing the decision of the in banc tribunal."²⁴⁷

²⁴¹ STUDY COMMITTEE REPORT, *supra* note 70, at 115.

²⁴² Gallard & Wood, *supra* note 83, at 9.

²⁴³ STUDY COMMITTEE REPORT, *supra* note 70, at 125.

²⁴⁴ *Id.* at 126.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 127.

²⁴⁷ *Id.* at 128.

Apart from the pilot project recommended by the Study Committee, there is a recommendation that "considerable respect" should be afforded to an earlier decision of another circuit; the recommendation includes the suggestion that, where disagreement with another circuit is contemplated, the "disagreeable" panel should circulate its opinion to the remaining judges of the court for comment.²⁴⁸ There is much to be said for this procedure, despite the dissenters' concern that it would lead to an "informal invisible in banc procedure," stifle the "percolation" in the decisionmaking process, and create extra work.²⁴⁹ The question, of course, is whether intercircuit conflicts really are as severe a problem as the Study Committee makes them out to be. The Committee may have been putting the cart before the horse when it recommended the pilot project and made the deference proposal before getting the results of the suggested study. In some matters, intercircuit conflict is not such a bad thing, especially when it may draw the attention of Congress to a situation best remedied by the legislative branch.

A rule of the Second Circuit provides for dispositions in open court or by summary order in cases of unanimous decision where "each judge of the panel believes that no jurisprudential purpose would be served by a written opinion"; a brief written statement may be made part of the order, but the rule provides that the statements are not formal opinions of the court and, since they "are unreported and not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court."²⁵⁰ Oral decisions are almost totally out of vogue in the Second Circuit, but the summary disposition procedure has accounted for between forty-five percent and sixty-five percent of the decisions of the Second Circuit in the last ten years.²⁵¹ In 1990, fifty-six percent, or 666 of the 1,190 cases disposed of by decision in the Second Circuit, were concluded by summary order.²⁵² Generally, cases not deemed to have "jurisprudential purpose" are those that have no "precedential purpose." The cases disposed of by summary order are decided on the basis of well-settled law, and no advantage would be gained by a full,

²⁴⁸ *Id.* at 129.

²⁴⁹ *Id.* at 129-30.

²⁵⁰ 2d Cir. R. 0.23.

²⁵¹ 1990 SECOND CIRCUIT REPORT, *supra* note 36, at 8.

²⁵² *Id.*

published opinion in the case. Much time and effort is saved by this decisional process, although the bar long has opposed the lack of general access to unpublished opinions.²⁵³ There is some unfairness in the nonpublication system, and the Study Committee has put forward a worthwhile suggestion to remedy the matter.

"A representative ad hoc committee under the auspices of the Judicial Conference should review policy on unpublished court opinions in light of increasing ease and decreasing cost of database access."²⁵⁴ The Committee recognizes that there is an important need to avoid loading books with opinions involving "easy applications of established law to fact."²⁵⁵ The Committee also acknowledges the argument "that non-publication policies are inconsistently administered and partially circumvented when regular litigants often circulate such opinions internally and make use of them in other cases."²⁵⁶ Even a decision not deemed significant enough for publication should be available to support the argument of a litigant to whom it applies. The use of computer databases for the compilation of these opinions seems to be "just the ticket" for the long-standing problems generated by nonpublication. These databases could be entered easily by all who wish to do so, and this process of open access to opinions, even those without precedential value, would be most reassuring to those who perceive unfairness in the present system. While the problem of unacknowledged use is said to arise if distribution is freely made while citation is restricted,²⁵⁷ it seems to this author that the problem is vastly overstated. One thing is certain—the published opinions are just too many and too lengthy, and part of the reason for that may lie in the role of law clerks in the decisional process.

It is generally accepted that law clerks have come to play an increasing role in the drafting of opinions.²⁵⁸ Indeed, the volume of opinions undertaken by each court of appeals judge leaves no alter-

²⁵³ See Pratt, *Summary Orders in the Second Circuit Under Rule 0.23*, 51 BROOKLYN L. REV. 479, 490-93 (1985) (summarizing six categories of "complaints"); see also Marke, *Unpublished and Uncitable Court Decisions*, N.Y.L.J., Mar. 26, 1991, at 4, col. 4 (noting bar's opposition to Second Circuit rule prohibiting citation of unpublished opinions).

²⁵⁴ STUDY COMMITTEE REPORT, *supra* note 70, at 130.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ See D. STIENSTRA, *UNPUBLISHED DISPOSITIONS: PROBLEMS OF ACCESS AND USE IN THE COURTS OF APPEALS* 47 (Federal Judicial Center 1985).

²⁵⁸ A. DiLEO & A. RUBIN, *LAW CLERK HANDBOOK: A HANDBOOK FOR FEDERAL DISTRICT AND APPELLATE COURT LAW CLERKS* § 1.200 (Federal Judicial Center 1977).

native. In the Study Committee survey, nine percent of the circuit judges responding prepared the first draft in all cases, fifteen percent never prepared the first draft and seventy-six percent prepared the first draft in some cases.²⁵⁹ Opinions drafted in the first instance by law clerks tend to be longer than those drafted by judges, a function of inexperience.²⁶⁰ What is not necessary at this juncture of increasing caseloads and excessive legal literature is any increase in the number or length of opinions published in hard-bound volumes.²⁶¹ No one can contend that *all* the opinions now published have "jurisprudential purpose" or that such a purpose is advanced by such exegeses as now are published. The goal should be to cut down the number and length of published opinions. The Study Committee recommendation for the increased use by district judges of their authority to make oral findings of fact and conclusions of law²⁶² would help to achieve this goal, at least as far as district court opinions are concerned.

The decisional process as it relates to the processing of *pro se* cases in the appellate context also came to the Study Committee's attention. The Committee noted that, in the First Circuit, *pro se* litigants were involved in about fifteen percent of the district court cases and thirty percent of the cases in the court of appeals.²⁶³ The Committee recommended (1) that data pertaining to *pro se* litigation be compiled by the Administrative Office of the United States Courts; (2) that a Judicial Conference Committee be designated to evaluate the costs of *pro se* litigation to the litigants and to the courts; and (3) that the committee so designated "recommend to the Conference methods to reduce those costs and to improve the efficiencies of dispensing justice in those cases."²⁶⁴ A large volume of *pro se* cases is processed in the district courts as well as in the Court of Appeals in the Second Circuit. The system used for processing *pro se* cases in the Second Circuit Court of Appeals might be of interest as a model for other circuits,²⁶⁵ but is open for any improvement that might come about as a result of the Study

²⁵⁹ Gallard & Wood, *supra* note 83, at 12.

²⁶⁰ Mahoney, *Law Clerks: For Better or For Worse?*, 54 BROOKLYN L. REV. 321, 339-40 (1988).

²⁶¹ See R. ALDISERT, *OPINION WRITING* 1-3 (1990).

²⁶² See FED. R. CIV. P. 52(a) (granting authority); see also STUDY COMMITTEE REPORT, *supra* note 70, at 102 (recommending increased use of authority).

²⁶³ STUDY COMMITTEE REPORT, *supra* note 70, at 112.

²⁶⁴ *Id.*

²⁶⁵ See *supra* notes 131-33 and accompanying text.

Committee's recommendation.

The decisional process in the Second Circuit has been much aided by the installation of facsimile machines in the chambers of each circuit judge. The exchange of memoranda, proposed opinions, and "tabs" has been expedited by this technological innovation, which finds much use in a court whose judges are spread over three states. Past studies have dealt with such innovations as word processing and electronic mail.²⁶⁶ In this age of computers, long-range technology planning is required.²⁶⁷ The Study Committee recommends that the Judicial Conference enhance its long-range planning capability, with the support of the Federal Judicial Center, and determine, among other things, how "the judiciary [should] adapt—in its administration and its decisional procedures—to major scientific and technological changes."²⁶⁸ The Committee recommends specifically that Congress increase Federal Judicial Center funding for training in automation and computers.²⁶⁹

No discussion of the decisionmaking process would be complete without a mention of the work of senior judges. Not only do senior judges bring great wisdom to the enterprise by reason of long experience and great knowledge, but they also carry an important share of the workload burden. In the Second Circuit, the ability of the court of appeals to maintain a current status has been due in large part to the work of senior judges.²⁷⁰ They are indeed a

²⁶⁶ See Greenwood, *Follow-Up Study of Word Processing and Electronic Mail in the Third Circuit Court of Appeals* (1980), in FEDERAL JUDICIAL CENTER, *MANAGING APPEALS IN FEDERAL COURTS* 801 (M. Tonry & R.A. Katzmman ed. 1988); Greenwood & Farmer, *The Impact of Word Processing and Electronic Mail on United States Courts of Appeals* (1979), in FEDERAL JUDICIAL CENTER, *MANAGING APPEALS IN FEDERAL COURTS*, *supra*, at 749.

Another indirect, yet important, way to advance the use of technology is through the decentralization of the budget process. While the Study Committee directs the Judicial Conference to consider how the judiciary should adapt to major scientific and technological changes, see STUDY COMMITTEE REPORT, *supra* note 70, at 147, presently the acquisition of new equipment or updated computer systems often involves a time-consuming process of waiting for authorization and disbursement of funds from the Administrative Office of the United States Courts. Decentralization allows each circuit to reallocate and disburse funds when needed. The Second Circuit was one of the first courts of appeals to participate in a pilot decentralization program. See *id.* at 161. Beginning on October 1, 1991, all courts of appeals on a voluntary basis may participate in the program over a three-year period. JUDICIAL CONFERENCE OF THE UNITED STATES, *PRELIMINARY REPORT OF THE ACTIONS TAKEN BY THE JUDICIAL CONFERENCE 2* (Mar. 12, 1991).

²⁶⁷ U.S. GOV'T PRINTING OFFICE, *FISCAL YEAR 1990 UPDATE: LONG RANGE PLAN FOR AUTOMATION IN THE UNITED STATES COURTS* (1990).

²⁶⁸ STUDY COMMITTEE REPORT, *supra* note 70, at 147.

²⁶⁹ *Id.* at 155.

²⁷⁰ Feinberg, *Senior Judges: A National Resource*, 56 BROOKLYN L. REV. 409, 413

"national resource."²⁷¹ The Study Committee recognizes the importance of using these semiretired judges, noting that their absence from the scene would require eighty additional judgeships in the nation at a cost of \$45 million.²⁷² It is not surprising that the Committee recommends that "Congress should *not* enact disincentives to senior judge service."²⁷³ The Study Committee makes two other important recommendations bearing on the decisional process. It recommends that court of appeals judges sit in other courts of appeals from time to time on an exchange basis for educational purposes²⁷⁴ and that the role of circuit chief judges be studied.²⁷⁵ The Second Circuit Court of Appeals has been fortunate in having been led by chief judges who have been excellent administrators as well as distinguished scholars, and who have assumed nearly full caseloads despite the time-consuming internal, external, and systemic nondecisional duties they have been constrained to perform.²⁷⁶ While adjustments in the decisional process may be helpful, it seems to this author that adjustments in jurisdiction offer the best, although probably the least possible, chance for success in dealing with the federal caseload crisis in the courts of appeals in general and in the Second Circuit in particular.

E. Jurisdiction

Adjustments in federal court jurisdiction can play a significant part in containing the flow of cases to the courts of appeals. The expansion of government and the creation of new federal rights through congressional legislation have accounted for a great deal of the present caseload burden. Congress has so extensively exercised its article III powers to confer jurisdiction upon the federal courts that it now seems that there is virtually no area of human activity with which the modern federal court system is unconcerned. Almost no session of Congress passes without some new area being opened up for federal court attention, either intentionally or by mistake. The need to cut back seems apparent as does the need for

(1990).

²⁷¹ *Id.*

²⁷² STUDY COMMITTEE REPORT, *supra* note 70, at 154.

²⁷³ *Id.*

²⁷⁴ *Id.* at 155.

²⁷⁵ *Id.* at 153.

²⁷⁶ See Feinberg, *The Office of Chief Judge of a Federal Court of Appeals*, 53 FORDHAM L. REV. 369, 389 (1984).

restraint in the future.²⁷⁷ The Study Committee has confronted the situation by recommending some divestiture of present jurisdiction and a process by which Congress can monitor the judicial impact of new legislation.

A substantial majority of the Study Committee recommends the abolition of diversity jurisdiction with certain narrow exceptions.²⁷⁸ The Committee notes that diversity cases account for a substantial portion of the federal court caseload and a not inconsequential portion of the federal judicial budget: almost one out of four district court cases; about one of two civil trials; about one in ten appeals; and more than one dollar in every ten in the federal judicial budget.²⁷⁹ Diversity jurisdiction enables litigants to have cases governed by state law resolved in federal court simply because they are citizens of different states, where the amount in controversy exceeds \$50,000.²⁸⁰ The federal courts have had diversity jurisdiction since the original Judiciary Act,²⁸¹ and the Framers of the Constitution obviously contemplated that Congress might want to confer this jurisdiction upon the federal courts.²⁸² The fear of prejudice to out-of-state residents commonly has been thought to form the original basis for this provision.²⁸³ The Study Committee gives two reasons in support of its recommendation: "no other class of cases has a weaker claim on federal resources," and "no other step will do anywhere nearly as much to reduce federal caseload pressures and contain the growth of the federal judiciary."²⁸⁴

The channeling of diversity cases to state courts would generate an average of eleven more cases for each general jurisdiction

²⁷⁷ For a contrary viewpoint, see Brown, *Nonideological Judicial Reform and Its Limits—The Report of the Federal Courts Study Committee*, 47 WASH. & LEE L. REV. 973 (1990).

²⁷⁸ STUDY COMMITTEE REPORT, *supra* note 70, at 38.

²⁷⁹ *Id.* at 38-39; see also A. PARTRIDGE, *THE BUDGETARY IMPACT OF POSSIBLE CHANGES IN DIVERSITY JURISDICTION* (Federal Judicial Center 1988).

²⁸⁰ 28 U.S.C. § 1332 (1988). Since the amount in controversy was increased from \$10,000 to \$50,000 in May of 1989, there was a decrease of 15% in diversity filings in 1990. See ADMINISTRATIVE OFFICE OF THE U. S. COURTS, *THE JUDICIARY BUDGET IN BRIEF FOR FISCAL YEAR 1992*, at 7 (Jan. 1991).

²⁸¹ Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78-79.

²⁸² U.S. CONST. art. III provides that the judicial power shall extend to controversies "between Citizens of different States." See M. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 7-8 (2d ed. 1990).

²⁸³ See C. WRIGHT, *supra* note 19, § 23, at 133.

²⁸⁴ STUDY COMMITTEE REPORT, *supra* note 70, at 39.

state court judge, an insignificant burden in view of the larger aggregate volume of cases in the state courts.²⁸⁵ The proposal for a total abolition of diversity jurisdiction still calls forth strong reaction, both pro and con.²⁸⁶ Accordingly, the Study Committee has put forward a "back-up proposal" consisting of four items designed "to remove the more extreme dysfunctions of the current jurisdiction": Plaintiffs should be prohibited from invoking diversity jurisdiction in their home states, since they need no protection against the bias feared by out-of-state litigants; corporations should be considered citizens of every state in which they do business for the reason that they need no protection against bias in states where they are licensed to conduct their affairs; noneconomic damages such as pain and suffering should be excluded when calculating the amount in controversy in order to prevent the puffing up of the jurisdictional minimum; and the amount in controversy should be raised to \$75,000.²⁸⁷ Some of the judges of the Second Circuit Court of Appeals have argued quite forcefully for the abolition of diversity jurisdiction.²⁸⁸

The need to deal with the tremendous increase in caseloads generated by the ever-expanding criminal jurisdiction of the federal courts, particularly in the area of narcotics prosecution, did not escape the notice of the Study Committee. The Committee recommended that "[f]ederal prosecuting authorities should limit federal prosecutions to charges that cannot or should not be prosecuted in the state courts and should forge federal-state partnerships to coordinate prosecution efforts."²⁸⁹ It also recommended that Congress provide additional funds to assist the states in the war on drugs, based on the finding that "[t]he federal courts' most pressing problems—today and for the immediate future—stem from unprecedented numbers of federal narcotics pros-

²⁸⁵ *Id.* at 41. For a detailed study of the effect on state courts of eliminating or restricting diversity jurisdiction, see Flango & Boersema, *Changes in Federal Diversity Jurisdiction: Effects on State Court Caseloads*, 15 U. DAYTON L. REV. 405 (1990).

²⁸⁶ See M.C. BUTLER & J. FRANK, *ABOLITION OF DIVERSITY JURISDICTION: AN IDEA WHOSE TIME HAS COME?* (National Legal Center for Public Interest 1983); see also M. REDISH, *FEDERAL COURTS* 566-69 (2d ed. 1989).

²⁸⁷ STUDY COMMITTEE REPORT, *supra* note 70, at 42.

²⁸⁸ See Feinberg, *Is Diversity Jurisdiction an Idea Whose Time has Passed?*, 61 N.Y. ST. B.J. 14 (July 1989); Kaufman, *supra* note 148, at 8-9; Miner, *Tensions of a Dual Court System*, 51 ALB. L. REV. 151, 158 (1987).

²⁸⁹ STUDY COMMITTEE REPORT, *supra* note 70, at 35.

ecutions."²⁹⁰ Between 1980 and 1990, criminal drug filings in the district courts rose from 3,127 to 12,221, an increase of 256%, and the impact is felt in the courts of appeals.²⁹¹ In many district courts, the need to attend to narcotics and drug cases makes it impossible for judges to keep current with their civil calendars.²⁹² There seems to be no need to pursue some of the less serious drug cases in the federal courts, and the untempered zeal of federal prosecutors in doing so must be curbed if there is to be a cutback in this jurisdiction.²⁹³ Unfortunately, Congress is just as zealous as federal prosecutors and is loath to permit any session to pass without providing some "ammunition" for the "drug wars."²⁹⁴ The institution of "Federal Day," a day set aside in some jurisdictions for the federal prosecution of drug offenders arrested by state officers,²⁹⁵ narrowly escaped institutionalization in the federal law. The proposal by Senator Joseph Biden, Chairman of the Senate Judiciary Committee, that all arrests for narcotics offenses on one day of each month in every federal district be prosecuted under federal law would have doubled the already staggering caseload of the federal system.²⁹⁶

The Study Committee found as a general matter that "[t]he current federal criminal law is hard to find, hard to understand, redundant, and conflicting."²⁹⁷ More than 3,000 separate federal statutory offenses are scattered throughout the United States Code, including offenses such as interstate transportation of water hyacinths,²⁹⁸ false crop reports,²⁹⁹ and false weather reports.³⁰⁰

²⁹⁰ *Id.*

²⁹¹ WORKLOAD STATISTICS, *supra* note 29, at 47.

²⁹² Sturgess, *Federal Court Watch: Judges Rap Stephens on Drug Cases*, Legal Times, Feb. 11, 1991, at 7; see also *Civil Justice Reform Act Implementation Moves Ahead*, 23 THE THIRD BRANCH, Feb. 1991, at 8.

²⁹³ See Miner, *The Consequences of Federalizing Criminal Law*, 4 CRIM. J. 16 (1989).

²⁹⁴ See, e.g., Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789; International Narcotics Control Act of 1989, Pub. L. No. 101-231, 103 Stat. 1954.

²⁹⁵ See, e.g., *United States v. Agilar*, 779 F.2d 123, 125 (2d Cir. 1985) (sale of narcotics arrest by New York City police officers became subject of federal prosecution because it occurred on Federal Day), *cert. denied*, 475 U.S. 1068 (1986).

²⁹⁶ *Biden vs. Federal Judges, Again; Plan Would Shift Many Drug Cases From States*, Legal Times, May 21, 1990, at 6.

²⁹⁷ STUDY COMMITTEE REPORT, *supra* note 70, at 106.

²⁹⁸ 18 U.S.C. § 46 (1988).

²⁹⁹ *Id.* § 2072.

³⁰⁰ *Id.* § 2074. The Study Committee also took note of reproducing the image of "Smokey the Bear" without permission, *id.* § 711, and taking false teeth into a state without the approval of a local dentist. *Id.* § 1821. See STUDY COMMITTEE REPORT, *supra* note 70, at

Considering it a "pressing matter for Congress's attention," the Committee recommends the establishment of a Code Revision Commission, noting that a similar Commission was authorized in 1966, presented a report in 1971 and never saw any results of its labors despite congressional consideration of the report between 1971 and 1982.³⁰¹ This author long has argued for a cutback in federal criminal jurisdiction and has urged that Congress discard all federal crimes except those clearly identified as pertaining to matters of national interest.³⁰² There seems to be no reason why crimes that effectively can be prosecuted under state law should be prosecuted in federal courts. Indeed, an argument can be made for conferring upon state courts jurisdiction over certain federal crimes.³⁰³

According to the Study Committee, petitions from state prisoners complaining of the conditions of their confinement constituted one percent of all federal civil filings in 1958 and 12.3% (approximately 26,155 in number) in 1990.³⁰⁴ In 1980 Congress authorized district courts faced with these cases, filed under 42 U.S.C. § 1983, to require the prisoners to exhaust state administrative procedures.³⁰⁵ The exhaustion requirement cannot be imposed, however, unless the United States Attorney General has certified, or a district court has determined, that the administrative procedures are in substantial compliance with certain minimum standards provided in the authorizing statute.³⁰⁶ Few states have pursued certification, one objection being the necessary involvement of prisoners themselves in the process of developing an appropriate administrative procedure.³⁰⁷ The Study Committee recommends that state administrative resolution of section 1983 claims brought by prisoners be encouraged by simply allowing a state to persuade

106.

³⁰¹ STUDY COMMITTEE REPORT, *supra* note 70, at 106.

³⁰² See Miner, *Federal Courts, Federal Crimes, and Federalism*, 10 HARV. J.L. & PUB. POL'Y 117, 127 (1987); see also Weinstein, *RICO and Federalism*, in NAT'L LEGAL CENTER FOR THE PUBLIC INTEREST, *THE RICO RACKET* 69 (1989).

³⁰³ See Miner, *supra* note 302, at 127-28.

³⁰⁴ WORKLOAD STATISTICS, *supra* note 29, at 31; STUDY COMMITTEE REPORT, *supra* note 70, at 49.

³⁰⁵ 42 U.S.C. § 1997e (1988).

³⁰⁶ *Id.* § 1997e(a)(2).

³⁰⁷ See Lay, *Exhaustion of Grievance Procedures for State Prisoners Under Section 1997e of the Civil Rights Act*, 71 IOWA L. REV. 935, 947 (1986) ("requirement of inmate and employee advisory input . . . derived directly from Congress' provision for the Attorney General's consultation with outside groups having expertise in the corrections field to assure effective and procedurally fair certified grievance procedures").

either a federal court or the Attorney General that its administrative remedy simply is "fair and effective."³⁰⁸ The federal lawsuit then could be put on "hold" for a period of 120 days while the administrative process took its course. The court would have the power to waive the exhaustion requirement in cases of hardship. The resolution of prisoner complaints in this way would provide some relief for the courts of the Second Circuit, and the small jurisdictional adjustment recommended also would afford prisoners an early resolution of grievances that otherwise might be subject to lengthy delays.³⁰⁹ Exhaustion of administrative remedies is required in the case of challenges to conditions of confinement by federal prisoners,³¹⁰ and the rule seems to be of benefit both to prisoners and courts in the federal system.

Some jurisdictional adjustments suggested by the Study Committee under the heading, "Creating Non-Judicial Branch Forums for Business Currently in the Federal Courts,"³¹¹ would be of marginal benefit in lessening the flow to the courts of appeals but are worthy of consideration. They include the creation of a new system for adjudicating disability claims under the Social Security Act, including a new article I Court of Disability Claims from which appeals would be taken to the courts of appeals on questions of law only;³¹² a prohibition on the policy of non-acquiescence by an amendment to the Social Security Act requiring the Secretary of Health and Human Services to abide by holdings of the circuit where the benefits claim is filed, except in test cases designated by the Solicitor General;³¹³ a five-year test program to allow the Equal Employment Opportunity Commission to arbitrate employment cases by consent;³¹⁴ and the repeal of the Federal Employer's Liability Act to allow injured railroad employees to recover damages under state or federal workers' compensation systems, and the re-

³⁰⁸ STUDY COMMITTEE REPORT, *supra* note 70, at 48-49. *But see* Note, *Resolving Prisoners' Grievances Out of Court: 42 U.S.C. § 1997e*, 104 HARV. L. REV. 1309 (1991) (cautioning against alteration of statute without further information or study).

³⁰⁹ *See Limit Inmates' Suits, New York State Asks*, N.Y. TIMES, Feb. 24, 1991, at A33, col. 1; *see also* Stashenko, *NY courts clogged by inmate suits*, Associated Press Release, Feb. 28, 1991.

³¹⁰ *E.g.*, *Johnpoll v. Thornburgh*, 898 F.2d 849, 850 (2d Cir.), *cert. denied*, 111 S. Ct. 63 (1990).

³¹¹ STUDY COMMITTEE REPORT, *supra* note 70, at 55.

³¹² *Id.* at 55-59.

³¹³ *Id.* at 59-60.

³¹⁴ *Id.* at 60-61.

peal of the Jones Act to allow recovery of damages by injured seamen under the Longshore and Harbor Workers' Compensation Act.³¹⁵ Another marginally beneficial jurisdictional adjustment, listed by the Study Committee under the heading "Reallocating Business Between the State and Federal Systems,"³¹⁶ would "amend the Employee Retirement Income Security Act to forbid removal from state to federal court of cases in which the amount in controversy is less than \$10,000."³¹⁷

Certain adjustments are proposed by the Study Committee in the interests of jurisdictional efficiency. These proposals are made in the spirit of the Committee's desire to have a "better" rather than a "smaller" federal court system.³¹⁸ The Committee recommended that Congress authorize pendent jurisdiction over parties when there is no independent federal basis for the exercise of such jurisdiction.³¹⁹ Recognizing that the abolition or curtailment of pendent and ancillary jurisdiction would eliminate some claims from the federal courts, the Committee deems it "unwise" to do so.³²⁰ The Committee's proposal would overcome the holding of *Finley v. United States*,³²¹ that "a grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different parties."³²² The Study Committee would allow the federal courts to hear any claim "arising out of the same 'transaction or occurrence' as a claim within federal jurisdiction, including claims, within federal question jurisdiction, that require the joinder of additional parties, namely, defendants against whom that plaintiff has a closely related state claim."³²³ The Study Committee would allow federal courts to dismiss state claims if such claims predominate or for other reasons.³²⁴ Another jurisdictional adjustment recommended in the interests of efficiency is the repeal of 28 U.S.C. § 1441(c), which

³¹⁵ *Id.* at 62-63. "Eliminating FELA and Jones Act cases would reduce the district courts' civil docket by 2 percent and the court of appeals docket by 1 percent." *Id.* at 62.

³¹⁶ *Id.* at 35.

³¹⁷ *Id.* at 43.

³¹⁸ See *supra* note 77 and accompanying text.

³¹⁹ STUDY COMMITTEE REPORT, *supra* note 70, at 47.

³²⁰ *Id.*

³²¹ 490 U.S. 545 (1989).

³²² *Id.* at 556.

³²³ STUDY COMMITTEE REPORT, *supra* note 70, at 47.

³²⁴ *Id.* at 48. The Study Committee reasons that federal court dismissal of predominantly state claims, or state claims presenting novel or complex questions of state law, would minimize friction between state and federal courts. *Id.* at 47-48.

allows the removal of separate and independent claims that would have been removable if sued upon alone when joined with one or more otherwise nonremovable claims.³²⁵ Section 1441(c) allows removal of the entire case where there is diversity jurisdiction between a plaintiff and one defendant but not between plaintiff and another defendant.

In exercising its authority to confer jurisdiction upon the federal courts, it is incumbent upon Congress to consider the impact of any legislation upon the judicial branch. Accordingly, the Study Committee has recommended that an Office of Judicial Impact Assessment be created to advise Congress on the effect of proposed legislation and the potential for litigation attendant thereto.³²⁶ Also proposed is a checklist for Congress to consider in reviewing proposed legislation.³²⁷ Obviously, a checklist has great potential for identifying technical problems in proposed legislation. A checklist review also can serve to identify duplicative and unnecessary legislation. The most comprehensive legislative drafting checklist yet developed seems to have been overlooked by the Study Committee. It was developed by the Office of Legislation and Public Affairs of the Administrative Office of the United States Courts and forwarded to all United States Senators by the Legislative and Public Affairs Officer of the Administrative Office.³²⁸ This author contributed to the drafting of that checklist, and it is set out here in full:

1. Does an existing statute of limitations apply to a civil enforcement action provided for in proposed legislation? If not, what if any statute of limitations should be specified in the proposed legislation?

2. Does proposed legislation include an effective date or applicability provision that states the intent of Congress on whether or not the legislation is to apply retroactively?

³²⁵ *Id.* at 94-95.

³²⁶ *Id.* at 89-92; see also FED. BAR COUNCIL COMM. ON SECOND CIRCUIT COURTS, A REPORT ON JUDICIAL IMPACT LEGISLATION (Dec. 15, 1989); Miner, *Preemptive Strikes on State Autonomy: The Role of Congress*, in THE HERITAGE LECTURES (The Heritage Foundation 1987). The Administrative Office of the United States Courts already has established a Judicial Impact Office to provide information to members of Congress, Judicial Conference committees, and others in connection with legislative proposals. See *Judicial Impact Office Takes Message to Congress*, 23 THE THIRD BRANCH, May 1991, at 1.

³²⁷ STUDY COMMITTEE REPORT, *supra* note 70, at 91-92.

³²⁸ See Letter from Robert E. Feidler to all United States Senators (June 12, 1990) (discussing checklist appended to letter).

3. If proposed legislation provides for an award of attorneys' fees, does it clearly specify the terms under which an attorney's fee can be awarded?

4. In the case of proposed legislation that covers a subject matter covered by existing or anticipated legislation of any State, does the proposed Federal legislation contain a clear statement on whether the proposed Federal legislation is to preempt the existing or anticipated State legislation?

5. In the case of proposed legislation that creates or modifies a criminal offense, does the proposed legislation clearly specify the state of mind element, if any? Is any inconsistency between the specified state of mind element and the state of mind element of analogous criminal offenses intended?

6. Is it intended that proposed legislation grant private parties a right to sue to vindicate a Federal interest? If so, is the nature and extent of that right specified in the proposed legislation?

7. Should proposed legislation contain a severability provision to cover the eventuality of a provision of the legislation being held unconstitutional?

8. Is it desirable that a claimant or grievant exhaust administrative remedies before the claimant or grievant is permitted to commence a civil action under proposed legislation? If so, does the proposed legislation contain such a requirement?

9. In the case of proposed legislation that creates obligations enforceable in Federal courts, does the proposed legislation specifically provide for personal jurisdiction of the obligated parties?

10. Does proposed legislation that regulates business transactions state whether or not any of the statutory provisions may be superseded by an arbitration or other dispute resolution agreement between parties to such transactions?

11. Does proposed legislation specifically define key terms?

12. Does proposed legislation that provides for administrative rulemaking, administrative hearings, or other administrative proceedings specify whether the proceedings are to be formal or informal?

13. In the case of proposed legislation intended to supersede other Federal law, does the proposed legislation specifically repeal or amend the other Federal law?

14. Does proposed legislation displace or accommodate judicial interpretations of existing law? If so, is that result intended?

15. Are State courts to have jurisdiction over civil actions resulting from proposed legislation? If so, does the proposed legislation so state, and does it further state whether such an action is removable to a Federal Court?

16. Does proposed legislation specify the forms of relief available in litigation under the legislation?

17. If proposed legislation specifies deadlines for judicial action, is the deadline necessary? If so, is the deadline reasonable with respect to judicial resources and existing caseload?

18. If proposed legislation provides for judicial review by a multi-judge panel, is the requirement for more than one judge necessary?

19. What, if any, effect will proposed legislation have on the caseload burden of the Federal and State courts? Do the benefits of the proposed legislation justify any increased caseload burden? If so, can the proposed legislation be drafted to minimize the increase in burden consistent with the policy objectives of the proposed legislation?

20. Will additional court resources be required in order for courts to handle litigation resulting from proposed legislation? Do the benefits of the proposed legislation justify the resulting increased requirements? If so, does the proposed legislation provide the required additional resources?

VI. ADJUSTMENTS ADOPTED AND FURTHER STUDIES INITIATED

The report of the Federal Courts Study Committee already has produced results. The Judicial Improvements Act of 1990, signed into law on December 1, 1990,³²⁹ implements several of the Committee's recommendations. Indeed, title III of the Act is entitled "Implementation of Federal Courts Study Committee Recommendations." In the area of court structure, the Act provides for a Federal Judicial Center study of "the full range of structural alternatives for the Federal Courts of Appeals," with a report on the study to be submitted to Congress and the Judicial Conference in two years.³³⁰ In the area of decisional process, the Act calls for a Judicial Center study of intercircuit conflicts, with a report to be completed by January 1, 1992 "on the number and frequency of conflicts among the judicial circuits in interpreting the law that remain unresolved because they are not heard by the Supreme Court."³³¹ The Center is directed specifically to consider whether intercircuit conflicts: impose economic burdens on those engaged

³²⁹ *Supra* note 20. The Act is summarized in Guiffra, *The Judicial Improvements Act of 1990*, N.Y.L.J., Dec. 26, 1990, at 1, col. 1.

³³⁰ Judicial Improvements Act, *supra* note 20, § 302(c).

³³¹ *Id.* § 302(a).

in interstate commerce; encourage forum shopping; create unfairness to litigants; and encourage federal agency nonacquiescence policies.³³²

The Study Committee's recommendation regarding pendent party jurisdiction was adopted in the 1990 Act, which provides, in a section entitled "Supplemental Jurisdiction," that district courts having original jurisdiction of a claim, except in diversity cases and as expressly provided by federal statute, "shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."³³³ Supplemental jurisdiction may be declined as to claims: raising state law issues of a novel or complex nature; substantially predominating over the claims subject of original jurisdiction; remaining after the dismissal of all claims subject of original jurisdiction; and involving exceptional circumstances and compelling reasons to decline.³³⁴

Congress partially accepted the Study Committee's recommendation to repeal 28 U.S.C. § 1441(c), which permitted the removal of an entire case from state to federal court where a separate and independent claim that would have been removable if sued upon alone were joined with one or more claims that were transactionally unrelated and otherwise not removable.³³⁵ Rather than repealing the entire provision as recommended, Congress opted for limiting removal to cases in which the separate and independent claims fall within federal question jurisdiction.³³⁶ After removal, the district court "may remand all matters in which State Law predominates."³³⁷ Three commentators already have identified a problem with the removal provision because the provision may be construed as authorizing remand of the federal question claim, a result clearly not intended.³³⁸ The same commentators also see a constitutional problem unless the new statute is interpreted to mean that the district court must remand all claims that would not have been within the federal court's original or supple-

³³² *Id.* § 302(b).

³³³ *Id.* § 310(a) (adding § 1367(a) to title 28).

³³⁴ *Id.* § 310(a) (adding § 1367(c) to title 28).

³³⁵ See *supra* note 326 and accompanying text.

³³⁶ Judicial Improvements Act, *supra* note 20, § 312(1).

³³⁷ *Id.* § 312(2).

³³⁸ See Mengler, Burbank & Rowe, *Recent Federal Court Legislation Made Some Noteworthy Changes*, Nat'l L.J., Dec. 31, 1990, at 20, col. 1.

mental jurisdiction if filed in the federal court in the first place.³³⁹ The provision in the original statute, affording discretion to remand "all matters not otherwise within [the] original jurisdiction," has been repealed.³⁴⁰ However, the amended statute may well serve its purpose of limiting the amount of litigation over separate claim removal, the Study Committee having noted that the old statute "cause[d] much litigation apart from the merits as defendants tr[ie]d and mostly fail[ed] to qualify for separate-claim removal."³⁴¹

Growing out of the Study Committee's recommendation for the establishment of bankruptcy appellate panels in each circuit, a provision of the Federal Courts Study Committee Implementation Act of 1990 permits the judicial councils of two or more circuits, if authorized by the Judicial Conference of the United States, to establish a joint bankruptcy panel comprised of bankruptcy judges from districts within each circuit.³⁴² The Implementation Act revises the venue provisions to make them substantially identical for diversity and federal question purposes,³⁴³ adds a four-year statute of limitations for civil actions accruing under acts of Congress passed after December 1, 1990,³⁴⁴ and empowers the Supreme Court to promulgate rules to define when a district court ruling is final under 28 U.S.C. § 1291.³⁴⁵ Although some of these matters may be helpful in making a "better" federal judicial system, they certainly do not bear on the overwhelming caseloads facing the

³³⁹ *Id.*

³⁴⁰ 28 U.S.C. § 1441(e) (1988).

³⁴¹ STUDY COMMITTEE REPORT, *supra* note 70, at 95.

³⁴² Judicial Improvements Act, *supra* note 20, § 305(2).

³⁴³ *Id.* § 311. Although Congress attempted to make the provisions for diversity and federal question jurisdiction nearly parallel to the venue provisions, the recent amendment to the venue statute, *see id.* § 311(a)(3), appears to eliminate entirely venue requirements in diversity cases. The Judicial Conference Committee on Federal-State Jurisdiction ("Committee") discovered that the phrase, "if there is no district in which the action may otherwise be brought," was inadvertently excluded from § 311(a)(3) of the Judicial Improvements Act, seemingly abolishing any independent venue requirement in diversity cases. The provision as amended appears to provide that venue lies in diversity cases if personal jurisdiction can be established. The Committee recommended to the Judicial Conference that 28 U.S.C. § 1391(a)(3) be amended, by reinserting the excluded phrase. *See SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON FEDERAL-STATE JURISDICTION* (Mar. 1991). The Judicial Conference agreed with the Committee's recommendation and will seek legislation to amend the statute accordingly. *See JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY REPORT OF THE ACTIONS TAKEN BY THE JUDICIAL CONFERENCE 4* (Mar. 12, 1991).

³⁴⁴ Judicial Improvements Act, *supra* note 20, § 313(a).

³⁴⁵ *Id.* § 315.

federal courts. The Judicial Improvements Act of 1990 in a sense provided "more of the same"—additional judges to cope with the crisis. Indeed, despite all the Committee's talk about not wanting a federal judiciary of "thousands," the Study Committee recommended that "Congress should quickly provide the additional appellate judgeships that the Judicial Conference has requested."³⁴⁶ The Committee observed that sixteen new judgeships for the courts of appeals were requested, based on 1987 statistics; that more would be required on the basis of more current figures; that "[t]he courts of appeals are reluctant to request additional judgeships because of concern about problems associated with circuit growth;" and that "requests invariably fall below the number that would be dictated by blind application of statistical standards."³⁴⁷ Title II of the Judicial Improvements Act of 1990, designated the "Federal Judgeship Act of 1990," provided for eleven new circuit judgeships.³⁴⁸

As further indication that the message of the Federal Courts Study Committee has not been afforded proper respect in Congress, one need look no further than Title I of the Judicial Improvements Act of 1990: the "Civil Justice Reform Act of 1990."³⁴⁹ The Reform Act, an outgrowth of a congressional plan to micro-manage the federal court system, requires each United States District Court to implement a "civil justice expense and delay reduction plan."³⁵⁰ The purposes of the plan are "to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes."³⁵¹ This seems to describe just the enterprise of the federal court system, working as best it can

³⁴⁶ STUDY COMMITTEE REPORT, *supra* note 70, at 112.

³⁴⁷ *Id.*

³⁴⁸ Judicial Improvements Act, *supra* note 20, § 202(a).

³⁴⁹ *Id.* § 101. A number of additional recommendations of the Study Committee have found expression in a bill (S. 1569) entitled "Federal Courts Study Committee Implementation Act of 1991" introduced by Senator Hefin, who is one of the congressional members of the Committee. The bill would authorize a five year pilot plan to resolve inter-circuit conflicts by allowing the Supreme Court to refer cases to a circuit court that had not yet ruled on the issue in conflict; direct Congress to consider the judicial impact of proposed legislation; require the establishment of bankruptcy appellate panels in each circuit unless a judicial council elects to create a joint panel with another circuit; and abolish the temporary emergency court of appeals. *Federal Courts Study Committee Bill Introduced*, 23 *The Third Branch*, Aug. 1991, at 5.

³⁵⁰ *Id.* § 103(a) (adding § 471 to title 28).

³⁵¹ *Id.*; Judicial Improvements Act, *supra* note 22, § 103(a).

against overwhelming odds. The courts are operating now in excess of full capacity, and, while court management can do wonders in improving court efficiency, it seems ludicrous to spend any length of time establishing "systems" and other bureaucratic devices that promise to waste more valuable time than is available for these purposes.

The problem with the legislation in question is that it is so detailed and time-consuming as to be counterproductive. The attention of the Congress to court jurisdiction and structure would be much more fruitful than its attention to administrative matters that are better dealt with by the courts themselves. The legislation calls for the chief judge of each district court to appoint an advisory group by March 1, 1991 to assist in the development of an expense and delay reduction plan.³⁵² The United States Attorney or his designee as well as attorneys and other persons representative of major categories of litigants must be included in the group,³⁵³ and a compensated reporter may be appointed.³⁵⁴ Each advisory group is required to submit a report containing an assessment of the court's workload and a recommendation for a model plan.³⁵⁵ After considering the recommendations, the court must adopt an appropriate plan and distribute copies to the Judicial Council and chief district judges in the circuit.³⁵⁶ The chief district judges and the chief judge of the circuit serve as a review committee and may suggest revisions.³⁵⁷ The Judicial Conference reviews each plan and also may suggest revisions.³⁵⁸

Although the components of each court's plan are not mandated, the Act lists six principles and six techniques of litigation management to be considered for inclusion in the plan.³⁵⁹ Empha-

³⁵² *Id.* (adding § 478(a) to title 28).

³⁵³ *Id.* (adding § 478(b) to title 28).

³⁵⁴ *Id.* (adding § 478(c) to title 28).

³⁵⁵ *Id.* (adding § 478(b) to title 28).

³⁵⁶ *Id.* (adding § 472(d) to title 28).

³⁵⁷ *Id.* (adding § 474(a)(1) to title 28).

³⁵⁸ *Id.* (adding § 474(b) to title 28).

³⁵⁹ *Id.* (adding § 473 to title 28). Such techniques include: (1) individualized case treatment that is responsive to considerations such as preparation time required, case complexity, and resources at the court's disposal; (2) involvement of judicial officer in pretrial phase; (3) case management conferences in proper instances; (4) endorsement of "cost-effective discovery"; (5) requirement that party making discovery motion first certify that he or she "has made a reasonable and good faith effort to reach agreement with opposing counsel"; and (6) institution of alternative dispute resolution referral policy. *Id.*

sized is the need for differentiated case management³⁶⁰ and the involvement of a judicial officer in the pretrial phase of the litigation process.³⁶¹ A pilot program must be implemented by the Judicial Conference in ten districts to be designated by the Conference, five in major metropolitan areas, by December 31, 1991.³⁶² The Southern District of New York in the Second Circuit already has been chosen for the pilot program.³⁶³ The pilot programs must incorporate the six principles of litigation management and cost and delay reduction. Ultimately, a study will be made to compare the results of the pilot programs with ten comparable districts that did not utilize the techniques required of the pilot programs. The Act provides for certain demonstration programs,³⁶⁴ statistical reports, a manual for litigation management, and comprehensive training programs for all judicial and nonjudicial personnel.³⁶⁵ In view of the ongoing programs conducted by the Federal Judicial Center and by individual courts over the years, the Civil Justice Reform Act of 1990 seems especially unnecessary and wasteful to many who toil in the system.³⁶⁶

VII. CONCLUSION

The report of the Federal Courts Study Committee is a valuable planning tool for the future. The extent to which its recommendations will need to be implemented is dependent in large part upon future caseload trends. In the absence of major adjustments in jurisdiction or structure, however, the expected continuation of growth will have a devastating effect on the ability of the federal court system to perform its functions with the fairness, dispatch, and efficiency expected of it. In some areas of the country, the federal courts have virtually become criminal courts, due to the unrestrained expansion of federal criminal jurisdiction. Despite many proposals for adjustments of various kinds made over the years, the customary congressional response has been to add more judges.

³⁶⁰ *Id.* (adding § 473(a)(1) to title 28).

³⁶¹ *Id.* (adding § 473(a)(2) to title 28).

³⁶² *Id.* § 105.

³⁶³ JUDICIAL CONFERENCE OF THE U.S., *supra* note 343, at 3.

³⁶⁴ Judicial Improvements Act, *supra* note 20, § 104.

³⁶⁵ *Id.* § 103(a) (adding §§ 479 & 480 to title 28).

³⁶⁶ It appears that the Civil Justice Reform Act has spurred the Judiciary into action. Chief Justice Rehnquist has appointed a committee within the judiciary to oversee long range planning. *Judges Devise Courts Plan to Keep up with Times*, The Miami Herald, Apr. 8, 1991, at 36.

The federal court system cannot be effective in the performance of the work expected of it if it becomes merely a duplicate of the state court system.

The Second Circuit Court of Appeals is faced with the types of problems that affect federal courts generally as it enters the second century of its life. Fortunately, it has over the years developed effective responses to its mounting caseloads and even today is able to function in a satisfactory manner, both in the quality of its work and in the speed with which its decisions are rendered. A combination of custom-tailored procedures, unique practices, revered traditions, and continued fine-tuning of the decisional processes and management techniques have enabled the court to function as it does. The United States Court of Appeals for the Second Circuit will draw on the work of the Federal Court Study Committee but will continue on its own to develop methods and techniques and to experiment with ways and means to cope with its important duties. Favored with outstanding leadership and hard-working judges, the Second Circuit begins its second century as it began its first—challenged by the turmoil of the times and prepared to meet the challenge.